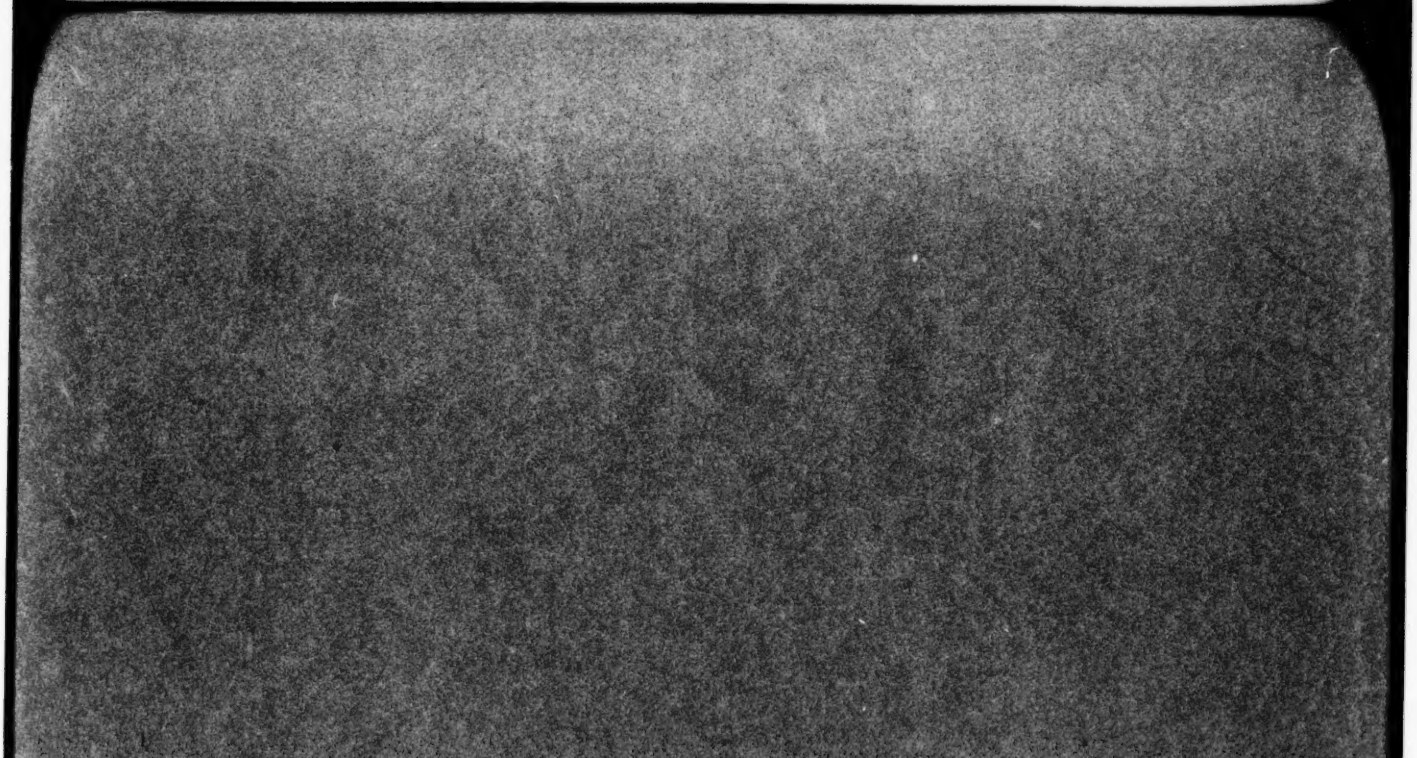

Supreme Court of the United States.

October Term, 1897.

No. 231.

E. H. HUBBARD, ASSIGNEE OF THE UNION LOAN & TRUST COMPANY,
Appellant,
vs.
J. KENNEDY TOD, ET AL.,
Appellees.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Brief of Jno. L. Webster for J. Kennedy Tod, et al.

Statement of the Points in Controversy.

On the 28th day of September, 1893, the Manhattan Trust Company filed its bill in the Circuit Court of the United States for the Northern District of Iowa, Western Division, against The Sioux City & Northern Railroad Company, praying for the appointment of a receiver to take possession of the railroad and its properties and to operate and preserve the same, under and by virtue of the terms of a trust deed made and exe-

cuted by the Sioux City & Northern Railroad Company to the Manhattan Trust Company under date of January 1st, 1890, to secure an issue of bonds to the amount of $1,920,000. *

E. H. Hubbard, assignee of the Union Loan & Trust Company, filed his bill of intervention in the said cause,** averring that the Union Loan & Trust Com-

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* Bill of Manhattan Trust Company v. The Sioux City and Northern Railroad Company (rec. pp. 10 to 22). Copy of the mortgage of the Sioux City and Northern Railroad Co. to the Manhattan Trust Company (rec. pp. 23 to 41).

On October 5, 1893, an order was made appointing receivers of the Sioux City and Northern Railroad as prayed (rec. pp. 67 to 70).

** Intervening Petition of E. H. Hubbard was filed Oct 5, 1893 (rec. pp 46 to 66). Answer of Tod & Co. was filed Nov. 16, 1893 (rec. pp. 74 to 125.)

Tod & Co. had also filed a demurrer and a plea to the Intervening Petition, but these were stricken from the files by an order dated Nov. 2, 1893 (pp. 126–7).

By leave of Court under an order dated Nov. 25, 1893 (rec. p. 127) an Amended Intervening Petition, was filed January 1st, 1894 (rec. pp. 128 to 185).

To this Amended Petition Tod & Co. filed an answer on Feb. 3, 1894 (rec. pp. 186 to 196). A replication was filed to answer (rec. pp. 197-8). Thus the issues stood as between the parties to this case during the taking of proofs.

On July 11, 1894, the Manhattan Trust Company filed a supplemental and amended Bill of Complaint averring default in payment of coupons, and declaring the principal of the debt due and praying for a foreclosure of the mortgage, (rec. pp. 198 to 230).

During the course of taking testimony solicitors of E. H. Hubbard assignee gave notice that they would apply to the court for leave to make further amendments to Intervening Petition

pany was a corporation of the State of Iowa, organized in the year 1885, and that thereafter it had been engaged in carrying on a loan and trust business up to and until the 25th day of April, 1893, when the said company made an assignment of all and singular its property and assets to the said E. H. Hubbard, of Sioux City, Iowa, and further claiming that during the term of its said business, and on the 3rd day of July, 1889, A. S. Garretson, John Hornick, J. D. Booge, Ed. Haakinson and D. T. Hedges had entered into a written agreement, spoken of in the record as a railroad syndicate agreement, for the construction of the Sioux City & Northern Railroad, and that thereafter the said syndicate entered upon the construction of the Sioux City & Northern Railroad, and from time to time the individual members of said syndicate executed and delivered their respective notes to the Union Loan & Trust Company, in various sums, and which notes the Union Loan & Trust Company had sold to various bankers and brokers throughout the United States; that there existed an understanding or agreement between the said railroad syndicate and the Union Loan & Trust Company, that the said syndicate should deposit with the Union Loan & Trust Company as collateral security for the said notes, the stock and bonds of the Sioux City & Northern Railway Company when issued; † that afterward

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which are set out (rec. pp. 234 to 281) and the Intervening Petition as so amended is set out in extenso (pp. 282 to 378) but no leave was granted to file the same until after the taking of proofs was closed, and after hearing of case had, and leave to file same is embodied in the decree (rec. p. 385).

† The indefinite and uncertain averments touching the deposit of the securities by the syndicate with the Union Loan &

the said railroad syndicate enlarged its operations by lending its aid to the Wyoming-Pacific Improvement Company, a construction company engaged in the construction of the Nebraska & Western Railroad, a line of road extending westward from Sioux City to the town of O'Neill, in the State of Nebraska, and that the said railroad syndicate also extended its aid and assistance to other corporations in and about

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Trust Company may be seen by the following quotations from the pleadings:

The first intervening petition, par. 5, (rec. 47) contains this clause: "Which properties (railroad properties) and all and every form or representation of title or interest therein were, under the understanding and agreement of said syndicate and said Union Loan & Trust Company, to be and remain in whatever form or priority of title the same might assume, as collateral security for the payment of the notes to be discounted and negotiated as aforesaid, and any balance or surplus of value of said properties were to belong to the said railroad syndicate for their joint and equal use and benefit."

In par. 6 is found this averment: "And the stock of said corporation (the Sioux City and Northern Railroad Company) was, as your petitioner is informed, substantially all of it held in the possession of the said Union Loan & Trust Company as collateral security for the payment of the notes with the proceeds whereof the said railroad has been constructed and equipped as aforesaid." (rec. p. 48).

In par. 5 of the amended petition of intervention (rec. p. 140) is the same phraseology as in the original petition of intervention above quoted. Par. 6 of the amended petition of intervention (rec. p. 141) is amended to include all bonds, and the clause reads: "And the bonds thereby secured and the stock of said corporation were, as your petitioner is informed, substantially all of it held in the possession of said Union Loan & Trust Company as collateral security for the payment of the notes with

Sioux City, such as the Pacific Short Line Bridge Company, the Union Stock Yards Company, the Sioux City Terminal Railroad & Warehouse Company, and the Sioux City Dressed Beef & Canning Company (which last named companies it is unnecessary to further consider at this time), § with a like understanding between the said syndicate and the Union Loan & Trust Company that the securities of the said respective companies coming into the possession of the railroad syndicate should be deposited with the Union Loan & Trust Company as collateral to the notes which the members

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the proceeds whereof the said railroad has been constructed and equipped as aforesaid."

Paragraph 5 of the second amended petition of intervention (rec. p. 284) contains this language: "And all and every form or representation of title and interest therein were, under the understanding and agreement of the syndicate and the said Union Loan & Trust Company, to be and remain in whatever form or priority of title the same might assume, as collateral security for the payment of the notes to be discounted and negotiated as aforesaid, and any balance or surplus of value in said properties was to belong to the said railroad syndicate for their joint and equal use and benefit."

§ No part of the stock or bonds of Pacific Short Line Bridge Company, Union Stock Yards Company, Sioux City Terminal Railroad & Warehouse Company, or of Sioux City Dressed Beef & Canning Company are involved in this suit. For reference to these companies see paragraphs 8, 9, 10, 11, 12, 13, 14, 15, 16 of intervening petition (rec. pp. 48 to 51). Also see paragraphs 8, 9, 10, 11, 12, 13, 14, 15, 16 amended intervening petition (rec. pp. 143 to 146) and paragraphs 8, 9, 10, 11, 12, 13, 14, 15, 16 of second amended intervening petition (rec. pp. 286 to 289.)

of the syndicate might give to the Union Loan & Trust Company on their behalf respectively.

The petition of intervention further charged that the Nebraska & Western Railroad Company (some times spoken of in the record as the Pacific Short Line), by foreclosure proceedings was reorganized under the name of the Sioux City, O'Neill & Western Railroad Company, and that the Union Loan & Trust Company was entitled to the possession of and lien upon the stock of the said Sioux City & Northern Railroad Company and the bonds of the Sioux City, O'Neill & Western Railway Company, as collateral security to the notes which the Union Loan & Trust Company had discounted for the use and benefit of the said syndicate, ‡

‡ Paragraph 7 of the first petition of intervention refers to the Sioux City, O'Neill & Western Railway Company and avers that the syndicate acquired said road and "caused the same to issue its first mortgage bonds to the amount of $2,340,000, and capital stock thereof to be issued to the extent of $3,600,000, all of which capital stock was at the time of the assignment of said Union Loan & Trust Company to your petitioner, in the hands of that corporation and came to your petitioner as further collateral security to said railroad syndicate paper" (rec. p. 48).

Paragraph 7 in the amended petition of intervention (rec. p. 141) avers that Garretson acquired all the issue of the Nebraska & Western Railway company bonds, $2,583,000, "all or a large part of which as thus acquired was deposited with the Union Loan & Trust Company as collateral security for the payment of the said railroad syndicate paper. Afterwards, and while said bonds, together with half of the stock of the Sioux City & Northern Railroad Company were deposited in ostensible pledge with J. Kennedy Tod & Company, as hereinafter set forth, there was a reorganization of the properties of the said Nebraska & Western Railway Company under an

and further charged that J. Kennedy Tod & Company had wrongfully come into the possession of $2,340,000

alleged foreclosure," and that a new issue of bonds was made under the name of the Sioux City, O'Neill & Western Railway Company to the amount of $2,340,000, "which bonds were substituted for said Nebraska & Western Railway Company bonds then in the hands of J. Kennedy Tod & Company."

In paragraph 30 of the amended petition of intervention (rec. pp. 155–6) in tracing the history of the Nebraska & Western Railroad Company bonds, it is averred that the Nebraska & Western Railroad Company "was built by a construction company, known as the Wyoming-Pacific Improvement Company, which corporation was to receive therefor substantially all of the bonds and stock of said Nebraska & Western Railroad Company, amounting in the par value of each of said securities to $2,583,000. * * * Said Wyoming-Pacific Improvement Company, after having received the bonds and stock of said Nebraska & Western Railroad Company, delivered substantially all the same to the Manhattan Trust Company, by which corporation the said securities were either pledged or held in trust as security for large loans which it negotiated and advanced to said Wyoming-Pacific Improvement Company." That afterward the Wyoming-Pacific Improvement Company collapsed, and that A. S. Garretson purchased the bonds of the Nebraska & Western R. R. Co., with moneys advanced by J. Kennedy Tod & Company, and that Garretson turned the said bonds over to the said Kennedy Tod & Company as security for such advances, together with 7,200 shares of the stock of the Sioux City & Northern Railroad Company, this being under the contract of October 1st, 1891, found at rec. p. 646, being the loan through J. Kennedy Tod & Co. of $1,000,000.

The second amended petition of intervention in paragraph 17a (rec. p. 290) avers that the Nebraska & Western Railroad was constructed by the "Wyoming-Pacific Improvement Company under a contract by which said construction company was

of the Bonds of the Sioux City, O'Neill & Western Railway Company, ‖ and of 14,200 shares of the capital

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to receive all the stock and bonds of the Nebraska & Western Railroad Company for constructing and equipping its said road," and the Manhattan Trust Company, as trustee under the mortgage, was to deliver the bonds to or under the direction of the said Wyoming-Pacific Improvement Company, and that a written agreement was entered into by certain subscribers in the sum of $1,050,000 by which the Manhattan Trust Company was to receive the bonds of the Nebraska & Western Railroad Company as earned by the Wyoming-Pacific Improvement Company, to secure the moneys advanced by the said subscribers, and it is further averred in paragraph 17c (rec. p. 292) that Garretson and Hedges subscribed to the said $1,000,000 loan to the said Wyoming-Pacific Improvement Company, and said loans becoming due to the various subscribers, it is further averred in paragraph 17g (rec. p. 294) that Garretson did undertake to purchase and acquire the said Nebraska & Western Railroad Company bonds, and it is further averred in paragraph 18 (rec. p. 303) that J. Kennedy Tod & Company on the first day of October, 1891, loaned to A. S. Garretson $1,000,000 for use in the consummation and completion of his purchase, and that Garretson deposited with J. Kennedy Tod & Company, as security for said $1,000,000 loan all of the stock and bonds of the Nebraska & Western Railroad Company, and $720,000 of the capital stock of the Sioux City & Northern Railroad Company, and subsequently (par. 18b, rec. p, 313) on the maturity of the $1,000,000 loan, a new loan for $1,500,000 was negotiated by Garretson by the sale of notes to the Union Debenture Company, for which J. Kennedy Tod & Company, as trustees, received all the bonds of the Sioux City, O'Neill & Western Railway Company, together with that part of the stock of the Sioux City & Northern Railroad Company involved in this suit, and the manner in which said loan was negotiated is further described in paragraph 18, (rec. p. 321).

‖ Paragraph 17 of the first intervening petition (rec. p. 52)

stock of the Sioux City & Northern Railroad Company, of the par value of $100 each, with knowledge or notice

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charges that A. S. Garretson in 1892 "without any apparent record or other authority from said Union Loan & Trust Company, caused all the bonds of the said Sioux City, O'Neill & Western Railway Company" and all or substantially all of the stock of the Sioux City & Northern Railroad Company to be pledged to Tod & Company to secure the notes of the Pacific Short Line Bridge Company to the amount of $1,500,000, "and at a time when your petitioner is informed all of said property should have been, and all or a great part of the stock of said Sioux City & Northern Railroad Company was actually in the hands and possession of said Union Loan & Trust Company as collateral security for the payment of railroad syndicate paper."

It will be noted that here is no averment that the bonds of the Sioux City, O'Neill & Western Railway Company had been in the possession of the Union Loan & Trust Company, and no averment that the part of the stock of the Sioux City & Northern Railroad Company so pledged was included in the stock of said company which had been in the hands or possession of the Union Loan & Trust Company.

Paragraph 17 of the amended petition of intervention (rec. p. 147) charges that on the first of October, 1891, Garretson caused all the bonds of the Nebraska & Western Railroad Company, and 7,200 shares of the stock of the Sioux City & Northern Railroad Company "to be delivered in ostensible pledge to the firm of J. Kennedy Tod & Company of New York, as alleged security for the payment of one million dollars ($1,000,000) in amount of his own notes," and at a time when "all of said securities should have been and a large part thereof were actually in the hands and possession of said Union Loan & Trust Company," and further alleges that after the reorganization of the Nebraska & Western Railroad Company under the name of the Sioux City, O'Neill & Western Railway Company, said Garretson, on the 31st day of December, 1892, pledged the bonds

of the rights of the Union Loan & Trust Company thereto, ¶ and praying that the said J. Kennedy Tod

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of the Sioux City, O'Neill & Western Railway Company and the stock of the Sioux City & Northern Railroad Company to J. Kennedy Tod & Company as trustees to secure notes to the amount of $1,500,000.

¶ Paragraph 14 of the first petition of intervention (rec. p. 55) avers that the creditors' committee of the Union Loan & Trust Company were advised "that said securities held by said J. Kennedy Tod & Company, or many of them, had been improperly taken from said Union Loan & Trust Company and placed with said firm, and that the apparent pledgor therefore had not sufficient right, title or interest in or to the same to enable the making of such a pledge, and that said J. Kennedy Tod & Company had such actual or constructive notice thereof as to prevent them from acquiring any title in or to the same as *bona fide* purchasers or pledgees for value."

Paragraph 24 of the amended petition of intervention (rec. p. 151) contains the same averments in the same language.

Paragraph 30 of the amended petition of intervention (rec. p. 154) avers that "your petitioner says that said J. Kennedy Tod & Company pretend that said A. S. Garretson had ample and sufficient right and authority to pledge or cause to be pledged to them the said bonds of the said Nebraska & Western R. R. Co. and said bonds of said Sioux City, O'Neill & Western R. R. Co. and said stock of the Sioux City & Northern R. R. Co., and that they received the same as *bona fide* pledgees thereof for value and without notice, and that they had ample and sufficient power of and authority to make the sale of said Sioux City, O'Neill & Western R. R. Company's bonds and said Sioux City & Northern R. R. Company's stock as aforsesaid for the default in payment of the interest due on the said loan on the 1st day of July last past."

In said paragraph it is further charged (rec. p. 155): "But your petitioner on advice and information charges that to the

& Company be required to surrender and deliver up to E. H. Hubbard, assignee of the Union Loan & Trust Company, the said securities free and clear of any claim or right or interest or lien on the part of the said J. Kennedy Tod & Company * and to which petition of intervention J. Kennedy Tod & Company and the individual members of said firm, J. Kennedy Tod, William Stuart Tod, and Robert E. Tod, together with the Manhattan Trust Company, were made defendants. †

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contrary of all and singular the foregoing pretenses the truth and fact is that said J. Kennedy Tod & Company had such actual and constructive notice or implied notice of the lack of authority in said A. S. Garretson to transfer or pledge said alleged securities to them as reasonably to put them upon inquiry in respect thereof."

* Paragraph 30 of the petition of intervention (rec. p. 59) contains this averment: "And that your petioner as assignee of said Union Loan & Trust Company is entitled to the immediate surrender of all and singular of said securities by said J. Kennedy Tod & Co. to your petitioner without any payment of principal or interest upon said alleged loan, or any other consideration whatsoever."

Paragraph 30 of the amended petition (rec. p. 155) contains the same averment in the same language.

† Paragraph 20 of the first petition of intervention (rec. p. 53) avers that J. Kennedy Tod & Co. exercised the option of declaring the principal of the debt to be due, and did, on the 26th day of September, "sell all the bonds of the said Sioux City, O'Neill & Western Railroad Company and 10,600 shares of stock of the said Sioux City & Northern Railroad Company, being all of said stock then in their possession, all together in one lot at auction on a single bid, for the round price of $1,000,000, to said J. Kennedy Tod & Co. as purchasing trustees."

Paragraph 20 of the amended petition of intervention (rec. p. 149) contains the same averment.

To this petition of intervention, J. Kennedy Tod & Company made answer, ‡ denying in general the averments of said petition of intervention, and more particularly denying the charges of fraud therein set forth, and by way of affirmative defense averring that under a contract dated the first day of October, 1891, A. S. Garretson was the owner and holder of the bonds of the Nebraska & Western Railway Company to the amount of $2,500,000, bearing date July 1st, 1889, and secured by a mortgage to the Manhattan Trust Company, and was also the owner of 7,200 shares of the capital stock of the Sioux City & Northern Railway

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‡ The answer of J. Kennedy Tod & Co., by way of plea to the jurisdiction of the court over the intervening petition, averred. (Rec. p. 75):

"First; That this court should not take and of right has not jurisdiction of the cause of action set forth in said intervening petition, because, (first) the same is not germane to, dependent upon or connected with the cause of action set forth in the bill of complaint filed in this cause; (second) there are united in said petition questions as to the rights of these defendants as pledgees of certain securities therein mentioned, some of which are shares of stock of the Sioux City and Northern Railroad Company, and other securities of another and different railroad company, viz., first mortgage bonds of the Sioux City, O'Neill & Western Railway Company, a corporation of Nebraska.

"Second; That this court should not take and of right has not jurisdiction of the said intervening petition, because these defendants J. Kennedy Tod and William S. Tod are respectively citizens of the State of New York, residing in the county and city of New York; and this defendant Robert E. Tod is an alien, a subject of the Queen of Great Britain and Ireland, and resides in the city of Edinboro, in said Kingdom; and Hugh O. Northcote, named as a defendant in said petition, is also an

Company, and then and there, under and by virtue of said contract, pledged the same to the said J. Kennedy Tod & Company to secure his 200 negotiable promissory notes for the sum of $5,000 each, all bearing date October 1st, 1891, and payable on demand. * Said

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alien, a subject of said Queen, and who resides in London in said Kingdom."

* The answer of Tod & Co. (rec. p. 85) avers that on October 1st, 1891, they loaned to A. S. Garretson on his promissory notes the sum of $1,000,000, secured by Nebraska & Western Railway Company bonds, $2,583,000, and 25,831 shares of the capital stock of the Nebraska & Western Railroad Company, and 7,200 shares of the capital stock of the Sioux City & Northern Railroad Company, and that Tod & Company sold the notes to various persons, "who became and were *bona fide* holders and owners thereof," and paid over unto the said Garretson, or to his order, the consideration therefor. The answer further avers (rec. p. 86) the pendency of the foreclosure proceeding and the reorganization under the name of the Sioux City, O'Neill & Western Railway Company, and that Tod & Company surrendered to the United States Circuit Court for the District of Nebraska the Nebraska & Western Railroad Company bonds " and received in exchange therefor the entire issue, $2,340,000 of the said first mortgage bonds of the Sioux City, O'Neill & Western Railroad Company in pledge as collateral security for the payment of the notes of A. S. Garretson, to the aggregate amount of $1,000,000, as aforesaid, which bonds were made payable to the Manhattan Trust Company, trustee, or bearer. And these defendants further allege that they continued to hold the said $2,340,000 of the bonds of said Sioux City, O'Neill & Western Railway and the 7,200 shares of the Sioux City & Northern Railroad in trust as security for said $1,000,000 of notes until on or about the 31st of December, 1892." That the foregoing proceedings were had under a written contract, which is annexed to the answer as Exhibit C (rec. p. 107) being the

contract of October 1st, 1891, recited in the fourth paragraph thereof, that the Nebraska & Western Railroad Company was in process of foreclosure, and that said Garretson expected to purchase the said railway property at the foreclosure sale, and to reorganize the same under a new corporate name, and which should issue a new series of bonds to the amount of $2,340,000, to be secured by a new mortgage to the Manhattan Trust Company, and which said last series of bondswere to be delivered to the said J. Kennedy Tod & Company, as security in the place and stead of the bonds of the Nebraska & Western Railroad Company. *

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same contract put in evidence as petitioner's Exhibit 3 (rec. p. 646).

* The amendment to the answer of Tod & Company (rec. p. 187) avers that while the Nebraska & Western bonds to the amount of $2,853,000 were held by Tod & Company as collateral security to the $1,000,000 loan under the contract of October 1st, 1891, there was a reorganization of the Nebraska & Western Railroad Company, under foreclosure proceedings and that the property was conveyed to the Sioux City, O'Neill & Western Railway Company, which issued its bonds to the amount of $2,340,000, "and which bonds were substituted for the bonds of the said Nebraska & Western Railway Company in the hands of the said J. Kennedy Tod & Co. in trust as aforesaid." Said answer (rec. p. 189) denies that the Sioux City, O'Neill & Western Railway Company property was acquired from the proceeds of the railroad syndicate paper, but avers that the same was paid for by the surrender of the Nebraska & Western Railroad bonds and stock then in pledge to J. Kennedy Tod & Co. to secure the $1,000,000 loan, and denies that the syndicate was the owner of said bonds and denies that the same were or should have been in the possession of the Union Loan & Trust Company.

That afterward, on the 31st day of December, 1892, the said Nebraska & Western Railroad Company, having become reorganized under the name of the Sioux City, O'Neill & Western Railway Company, and a new issue of bonds to the amount of $2,340,000 having been made and secured by a mortgage to the Manhattan Trust Company as Trustee, and the said A. S. Garretson having become the owner and holder of said bonds, pursuant to the plan of reorganization above stated, and the loan of $1,000,000 under the contract of October 1st, 1891 being payable, the said A. S. Garretson desiring to make a new loan in the sum of $1,500,000, entered into an agreement, agreeably to himself and J. Kennedy Tod & Company, by which the said Garretson ostensibly sold the said bonds of the Sioux City, O'Neill & Western Railway Company, to the Pacific Short Line Bridge Company of Sioux City, Iowa, for the sum of $1,500,000, and accepted and received from the Pacific Short Line Bridge Company therefor its 300 promissory notes in the sum of $5,000 each, aggregating in all $1,500,000, and received back from the Pacific Short Line Bridge Company as collateral security for the said notes the said bonds of the Sioux City, O'Neill & Western Railway Company, and thereupon the said Garretson sold the said notes for $1,500,000 to the Union Debenture Company, and as security therefor delivered to J. Kennedy Tod & Co. the said bonds of the Sioux City, O'Neill & Western Railway Company, and 14,200 shares of the capital stock of the Sioux City & Northern Railway Company, to be held by J. Kennedy Tod & Co. as trustee for the benefit of and security to the persons who might become the purchasers or holders of the said notes, aggregating

$1,500,000, which had heen sold by Garretson to the Union Debenture Company. *

That subsequently, default having been made, and at the request of the holders of said notes, the said J. Kennedy Tod & Company caused the said bonds to be sold, under a provision of the contract of December 31st, 1892, (being the contract under which the said bonds were deposited with J. Kennedy Tod & Company), and at which sale the said bonds were purchased by J. Kennedy Tod & Company as purchasing trustee, and that no part of the said notes for $1,500,000 has

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* The answer of J. Kennedy Tod & Company (par. 9, rec. p. 78) avers that "all of the first mortgage bonds of the Sioux City, O'Neill & Western Railway Company were, on or about the 31st day of December, 1892, duly pledged and hypothecated unto these answering defendants as co-partners under the firm name of J. Kennedy Tod & Company, in trust, as collateral security for the payment of 300 promissory notes of the Pacific Short Line Bridge Company, made payable to the order of and endorsed by the said A. S. Garretson, each of said notes being in the sum of $5,000, and all which said notes were duly sold and delivered unto divers parties who became and were and are now *bona fide* holders thereof for value and before maturity, and who became and were entitled to said stocks and bonds as collateral security for the payment thereof."

The amendment to the answer (rec. p. 189) admits that on the 31st day of December, 1892, Garretson caused the title to the bonds of the Sioux City, O'Neill & Western Railway Company, and 10,200 shares of the capital stock of the Sioux City & Northern Railway Company to be transferred to the Pacific Short Line Bridge Company, and the notes of said company to be made and given to himself in amounts aggregating $1,500,000, and payment thereof to be secured by the pledge of the said stock and bonds, as alleged in the original answer of these defendants.

been paid, except as the note holders may have certificates showing their respective interests in the bonds so purchased by J. Kennedy Tod & Co. as purchasing trustee. *

The answer also contains the averments of good faith in all the transactions between the said Garreston and the said J. Kennedy Tod and Company, and that the said notes are in the hands of *bona fide* owners for value, without notice of any rights or claims of the Union Loan & Trust Company. †

There is a vast amount of evidence in the record touching the stocks and bonds of the various companies heretofore mentioned, with which the railroad syndicate in some manner or form became connected, but the issues in this case, so far as J. Kennedy Tod & Company are concerned, are confined to the bonds of the Sioux City, O'Neill & Western Railway Company, and that portion of the stock of the Sioux City & Northern Railroad Company which was pledged under the contract of October 1st, 1891, to secure $1,000,000,

* The sale of the bonds on the 26th day of September, 1893, by J. Kennedy Tod & Company under the $1,500,000 loan agreement, is pleaded in the answer (rec. p. 90).

† The answer (rec. p. 85) avers that "said promissory notes so certified and secured were sold and delivered by the said Union Debenture Company to sundry persons, firms or corporations who purchased the same for value and before maturity, in reliance upon the security of the said stock and bonds deposited with these petitioners as trustees and certified to by them as aforesaid, and as these answering defendants are informed and believe, without knowledge or notice of any claim of interest or ownership in said securities by the Union Loan & Trust Company."

and the subsequent contract of December 31, 1892, to secure the $1,500,000.

On the 15th of January, 1895, the United States Circuit Court aforesaid entered a decree authorizing E. H. Hubbard, assignee of the Union Loan & Trust Company, to redeem the Sioux City, O'Neil & Western Railway Company bonds, $2,340.000, and the capital stock of the Sioux City & Northern Railway Company, 10,600 shares, upon the payment to J. Kennedy Tod & Company, as trustee, the sum of $1,500,000, with interest from December 30th, 1892. *

SHIRAS, District Judge, in his written opinion† said in substance that under the arrangement between the railroad syndicate and the Union Loan & Trust Company, the stock and bonds of the Sioux City & Northern Railroad Company were to be deposited with the Union Loan & Trust Company as security for the notes discounted through the Union Loan & Trust Company, and that afterward the syndicate became interested in the Nebraska & Western Railroad Company, with a

* It is ordered, adjudged and decreed by the Court that the intervenor E. H. Hubbard, Assignee of the Union Loan & Trust Company, is entitled to redeem the securities in question, being two thousand three hundred and forty (2,340) of the first mortgage five per cent. bonds of the Sioux City, O'Neill & Western Railway Company of the sum of $1,000 each, and ten thousand six hundred (10,600) shares of the capital stock of the Sioux City & Northern Railway Company of the par value of $100 each upon the payment to the defendant company, the firm of J. Kennedy Tod & Company, as trustees, the sum of one million five hundred thousand dollars ($1,500,000) with interest thereon from December 30th, 1892, * * (rec. pp. 385–6.)

† The opinion of Judge Shiras is found in the record, pp. 387–398.

like understanding as to the depositing of securities; that notwithstanding this arrangement and understanding, and during the time the Nebraska & Western Railroad Company was in process of foreclosure, A. S. Garretson entered into a contract, dated October 1st, 1891, with J. Kennedy Tod & Company, ‡ by which he represented that he was the owner and holder of $2,500,000 of the Nebraska & Western Railroad Company bonds, and 7,200 shares of the capital stock of the Sioux City & Northern Railroad Company, and that he proposed to purchase said property at said foreclosure sale, and to accomplish which end he needed money, and borrowed from the said J. Kennedy Tod & Company the sum of $1,000,000, and pledged as security therefor the said bonds and stock, and with the further proviso in said contract that upon the reorganization of the railway company, the new issue of bonds should be pledged with the said J. Kennedy Tod & Company, in place of the bonds of the Nebraska & Western Railroad Company; that subsequently the reorgnized company, the Sioux City, O'Neill & Western Railway Company, issued its bonds in the sum of $2,340,000, secured by a mortgage to the Manhattan Trust Company, and which said bonds and 7,200 shares of the capital stock of the Sioux City & Northern Railroad Company; thus came into the hands of J. Kennedy Tod & Company, as security for the said $1,000,000 of notes. That in December, 1892, a further loan was made, known as the loan of $1,500,000, §

‡ The Contract of October 1st, 1891, is petitioner's exhibit 3 (rec. pp. 646-651).

§ The contract of December 31st, 1892, by which Garretson pledged the bonds and stock to J. Kennedy Tod & Co. as trustee, to secure the loan for $1,500,000, is petitioner's Exhibit 1. (Rec. pp. 632-642).

which seems to have had for its main purpose the retirement of the first loan of $1,000,000; that in the execution of this loan (some question having arisen as to the right of the Sioux City, O'Neill & Western Railway Company to issue its notes in so large an amount), an arrangement was entered into by which the bonds should be transferred to the Pacific Short Line Bridge Company, and that the said Bridge Company should execute and deliver to A. S. Garretson its notes in payment for the bonds in the amount of $1,500,000, and should deliver to the said Gar son the said bonds as collateral security for the sa es, and that the said notes were then endorsed by G. tson and by him sold to the Union Debenture Company, ‖ and the said bonds of the Sioux City, O'Neill & Western Railway Company and the 10,200 shares of the capital stock of the Sioux City & Northern Railroad Company were transferred and delivered to J. Kennedy Tod & Company, as trustees. That from the whole of the evidence it is deducible that the Union Loan & Trust Company parted with the securities with knowledge that they were to be rehypothecated by Garretson, and that E. R. Smith, the Secretary and Treasurer of the Union Loan & Trust Company, obeyed Garretson's instructions, and acted as having full authority from the company so to do, and that it is not now open to the Union Loan & Trust Company to repudiate the acts of its Secretary and Treasurer in placing the said bonds and stock under the control of the said Garretson, whereby Garretson was enabled to repledge the same; that in

‖ The contract by which Garretson sold to the Union Debenture Company the Bridge Company notes for $1,500,000, to secure which the bonds and stock were deposited with J. Kennedy Tod & Company as trustee, is in the record, pp. 667–70.

seeking the redemption of these securities, neither the syndicate nor the Trust Company can be permitted to question the validity of the varied money transactions preceding the loan of $1,500,000, and which led up thereto, as the parties in interest therein are not the parties to this suit, and cannot be made such; that to enable the syndicate, as matters now are, to reclaim these securities, it would be incumbent upon it to repay the loan, principal and interest, which they obtained by pledging the securities, and the Trust Company is under a like obligation.

The United States Circuit Court of Appeals in its opinion said:

"For the information of counsel, it will not be out of place in the present status of the cases, to say that both of the judges of this court were and are still quite agreed that the position taken by counsel for E. H. Hubbard, assignee of the Union Loan & Trust Company, relative to the ownership of the bonds of the Sioux City, O'Neill & Western Railway Company is untenable. One of the judges of this court was of opinion * * * that the assignee of the Union Loan & Trust Company should be permitted to redeem said bonds by the payment of the sum of $1,500,000 with interest thereon from December 30th, 1892, to the date of payment. * * * The other member of this court entertained the view that was contended for by J. Kennedy Tod & Company * * * that the sale of said bonds on September 26th, 1893, to J. Kennedy Tod & Company gave the latter firm a good title to the securities so bought, and that the assignee of the Trust Company was without right to redeem the same." ¶

¶ The opinion of the United States Circuit Court of Appeals is found in the record at pp. 1772–4.

The sale of September 26th, 1893, above referred to, was the public sale of the bonds made by J. Kennedy Tod & Company at the request of the holders of the $1,500,000 of notes, by reason of the default, and at which sale J. Kennedy Tod & Company bought in the bonds as purchasing trustee. As above indicated, but two members of the United States Circuit Court of Appeals heard the case. One of them was in favor of affirming the decree entered by Judge Shiras, and the other member of the court was in favor of entering a decree to the effect that J. Kennedy Tod & Company, as purchasing trustee, had become the absolute owner of the bonds, free from any lien of the Union Loan & Trust Company.

Statement of Facts and Evidence on the Material Points.

I

The Union Loan & Trust Company was a Corporation Whose Affairs Were Practically Under the Management of Three Persons, George L. Joy, A. S. Garretson and E. R. Smith, Each of Whom Knew of and Consented to the use Which Garretson Made of the Bonds and Stock in Controversy.

The records of that company show that it began business on the 7th day of October, 1885, with a capital stock of $100,000, with power to increase the capital to $1,000,000. Its affairs were to be controlled by a board of five directors, and its officers were to be a president, a vice president and a secretary. * Under its by-laws

* The articles of incorporation of the Union Loan & Trust Company are found in the record (pp. 1071–3.) Article 3 de-

it was to have a committee on applications for loans of three members, who were to decide upon the sufficiency of security offered for loans. †

On November 2nd, 1885, George L. Joy was elected president, A. S. Garretson vice president, and E. R. Smith secretary, ‡ and these three persons were appointed a committee on loans. On January 25th, 1886, E. R. Smith was given the additional office of treasurer, and these three persons continued to hold said offices and to compose the committee on loans up until the date of the assignment to E. H. Hubbard, April 24th, 1893. On October 14th, 1886, the capital stock was increased to $500,000, § and on January 21st, 1889, the capital stock was increased to $1,000,000, ‖ but the three persons named continued to be the only members of

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fines its business; Article 4 fixes the capital stock; Article 5 the Board of Directors, and Article 7 its officers.

† The by-laws are found in the record (pp. 1074–6) Section 4 provided for "a committee of three on applications for loans;" Section 5 provided that "the committee on applications for loans shall investigate and decide upon the sufficiency of the security offered."

‡ The election of officers November 2nd, 1885, appears in the record at p. 1077, and at which meeting Joy, Garretson and Smith were appointed the committee on loans. January 25th, 1886, (rec. p. 1078) the same officers were re-elected and the same committee on loans re-appointed. (p. 1192.) February 1st, 1893, the same officers were re-elected. (rec. pp. 1100–1).

§ The record showing the increase of the capital stock to be $500,000 is found in the record at pp. 1079–80.

‖ The proceedings showing the increase of the capital stock to $1,000,000 is found in the record at pp. 1086–7.

the Board who took any interest in its affairs, and were the only persons present at its directors' meetings. ¶

George L. Joy, the president, paid but little atten-

¶ To the point that Joy, Garretson and Smith were the only three members of the Board who attended its meetings, see record of board meeting June 23rd, 1886, (p. 1078): "Three members being present, George L. Joy, A. S. Garretson and E. R. Smith. Called to order by president." Board meeting December 31st, 1886, (p. 1082,) "George L. Joy, A. S. Garretson and E. R. Smith being present. Meeting called to order by president." See record of board meeting December 31st, 1887. (p. 1083.) "Meeting called to order, the following members being present: William L. Joy, A. S. Garretson and E. R. Smith." Meeting of Board June 30th, 1888 (p. 1085): "Following members of the Board being present: George L. Joy, William L. Joy, A. S. Garretson and E. R. Smith." Board meeting of December 31st, 1888. (rec. p. 1085.) "The following members being present: William L. Joy, A. S. Garretson and E. R. Smith." Board meeting December 31st, 1888, (rec. p. 1086.) "The following members being present: William L. Joy, A. S. Garretson and E. R.Smith." Board meeting of January 21st, 1889. (rec. p. 1092.) "Members present: William L. Joy, A. S. Garretson and E. R. Smith." Board meeting July 29th, 1889. (rec. p. 1093.) "Members present: George L. Joy, William L. Joy, A. S. Garretson and E. R. Smith." Board meeting October 21st, 1890, (rec. p. 1096.): "George L. Joy, William L. Joy, A.S.Garretson and E. R. Smith being present." Board meeting December 31st, 1891, (rec. p. 1098): "Directors W. L. Joy, A. S. Garretson and E. R. Smith present." Board meeting June 30th, 1892, (rec. p. 1098) "Directors A. S. Garretson, William L. Joy and E. R. Smith present." Board meeting February 1st, 1893, (rec. p. 1100.) "William L. Joy, A. S. Garretson and E. R. Smith present." Board meeting April 24th, 1893, rec. p. 1101.) "Members of the board present: William L. Joy, A. S. Garretson and E. R. Smith."

tion to the business of the company, and was absent from Sioux City much of the time. * Garretson was rarely in the office of the company, and E. R. Smith, the secretary and treasurer, was left in the practical charge and management of its affairs. Applications for loans were rarely presented to the committee on loans, but Smith accepted and discounted notes as if he were the sole man in charge of the business. † The corporation acquiesced in this procedure, and by its acquiescence must be held to have approved of this manner of conducting this business. ‡

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* Garretson testified:

"Q. He (George L. Joy) was very seldom at the company's office and didn't take any active part; isn't that so?"

"A. Seldom after 1891." (rec. p. 762.)

Again (p. 785) Joy has been in California more or less for the last five years, and (p. 785–6) Mr. Smith "very largely" ran the Union Loan & Trust Co.

† Garretson testified:

"Q. Mr. E. R. Smith was the active person who was at the Trust Company, was he?

"A. Yes, sir." (rec. p. 762.)

‡ The records do not show any report from the committee on loans during these years, nor any deposit of the railroad securities with the Union Loan & Trust Company.

Garretson, (p. 762.)

"Q. Now, when drafts were made or when notes were made which were sold and credited to the account of John Hornick, Trustee, who did that on behalf of the syndicate? Who took the notes to the Union Loan and Trust Company?

"A. The parties borrowing. Those parties at that time were John Hornick, Mr. Edward Haakinson and Mr. James E. Booge. Those were the people who raised all the money to construct the Sioux City and Northern R. R.

"Q. What I mean is, did they take the notes in to Mr. Smith, or did you?

From the whole record it appears that when the individual members of the syndicate presented notes to the Union Loan & Trust Company, E. R. Smith, as secretary and treasurer of the company, accepted the notes without the same being accompanied by collateral, but such notes were constantly discounted by him upon an indefinite and uncertain understanding that the securities were thereafter to be, or would be deposited with the Union Loan & Trust Company. This may be illustrated by a reference to the syndicate notes discounted to enable the syndicate to obtain money for the construction of the Sioux City & Northern road. Most of these notes were so discounted before the stock and bonds of the Sioux City & Northern were issued.

Even when securities did come to the hands of Mr. Smith as Secretary and Treasurer of the Union Loan & Trust Company, he parted with the securities to A. S. Garretson or transmitted the securities upon the request of A. S. Garretson to the Manhattan Trust Company and to J. Kennedy Tod & Company, as the sole representative and active man representing the

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"A. Yes, sir; they did.

"Q. They would take them in to Mr. Smith and Mr Smith would sell them and put the proceeds to their credit?

"A. Yes, sir; to the credit of John Hornick, trustee. * * *

"Q. Then you would not be present in the trust company's office at the time these notes were brought in for discount?

"A. No; I was seldom in the trust company after 1890." (rec. p. 762.)

Smith testified (p. 827) that he was "the constant officer in charge of the Union Loan & Trust Co." and that Joy, the president, was not frequently there.

Union Loan & Trust Company, and thereby constantly recognized the right of A. S. Garretson to withdraw the said securities and to sell the same or rehypothecate the same. *

The administration of the affairs of the Union Loan and Trust Company entirely justified the statement of Judge Shiras in his opinion: "It is entirely clear that E. R. Smith, the Secretary and Treasurer of the Trust Company, dealt with these securities as though he had full authority from the company so to do, and he obeyed Garretson's instructions in regard to the same without demur, and it does not appear that the Trust Company or any officer thereof ever objected to such disposition of the securities, and furthermore, so far as the evidence in this case discloses, the general management of the business of the Trust Company was entrusted to Smith, with little, if any, supervision on the part of the directors or other officers of the corporation." †

II

The Syndicate Contract did not Provide for the Depositing with the Union Loan & Trust Company of the Railroad Securities, and There was no Agreement in Writing that Such Securities Should be Deposited, and Whatever Understanding There was on that Subject was not Complied With.

The agreement between A. S. Garretson, John Hornick, J. E. Booge, Ed. Ha kinson and D. T. Hedges,

* "To support the point that E. R. Smith, as secretary of the Union Loan & Trust Company, voluntarily transferred the securities of the Manhattan Trust Company and to J. Kennedy Tod & Co., see letters in the record, pp. 652 to 658, and from 661 to 666.

† See record, p. 392.

spoken of as the Railroad Syndicate agreement, was entered into on the 3rd day of July, 1889. This was an agreement by which these five persons associated themselves together for the purposes of building and equipping the Sioux City & Northern Railroad, and providing that all money borrowed and contracts made for the building and equipment of the road should be borne equally by the said parties, and that where notes should be executed by one of the individuals for the purposes expressed, that each of the parties should be held equally liable therefor, and that all money borrowed should be placed to the credit of John Hornick, trustee, at the office of the Union Loan & Trust Company, and that the said contract should continue until the Sioux City & Northern Railroad should be completed and its debts paid, and that this agreement should be left with the Union Loan & Trust Company. *

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* The syndicate agreement is found in the record (p. 941) as follows:

"SIOUX CITY, IA., July 3, 1889.

"Memoranda of agreement between D. T. Hedges, John Hornick, Jas. E. Booge, Ed. Haakinson and A. S. Garretson.

"Whereas the aforementioned parties have associated themselves together for the purpose of building and equipping the Sioux City & Northern Railroad, said road to be built without delay from a point near Merrill Station, Iowa, to a junction with the St. Paul, Minneapolis & Manitoba road at or near Palisades, Dakota, we further agree:

"First: That all money borrowed and contracts made for the building of the road and for equipment shall be born equally by the parties hereto.

"Second; That should it be thought best for one member of the parties hereto to make contracts for materials or to execute notes for borrowed money, all such contracts and all such

This agreement was practically nothing more nor less than a co-partnership agreement between these five persons, and the office of the Union Loan & Trust Company was named as the place for the depositing of the agreement and the place where the account of the co-partnership should be kept, in the name of John Hornick, trustee. It contained no provision that the money borrowed for its uses should be borrowed from or through the Union Loan & Trust Company; *neither did it contain any agreement for the depositing with the Union Loan & Trust Company of the stock and bonds of*

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notes so executed by a single member hereof for purposes herein expressed, shall be the obligations of each one of the parties to this contract, and each one hereto shall be equally liable therefor. All borrowed money to be placed to the credit of John Hornick, Trustee, at the office of the Union Loan & Trust Company, and all (monies) paid out to be paid out upon the order of said John Hornick, Trustee, and vouchers to be taken therefor.

"Third, That this contract shall hold good until said road is built and until all debts in connection therewith are paid, and this memoranda of agreement shall be left with the Union Loan & Trust Company until all of the conditions contained herein are fulfilled and until its surrender is agreed upon by all the parties hereto.

"Fourth. All losses to be borne equally by the parties hereto and all profits to be divided equally between the parties to this contract.

"(The fourth paragraph above is written in ink, the balance of the agreement being in typewriting).

"A. S. GARRETSON,
"JOHN HORNICK,
"J. E. BOOGE,
"ED. HAAKINSON,
"D. T. HEDGES."

the Sioux City & Northern Railroad, as security for any money that it might borrow.

The last above observation is important to be borne in mind, as we proceed to look into the uncertain character of the claim of the Union Loan & Trust Company to the securities in controversy in this suit. †

Whenever the Union Loan & Trust Company desired to rediscount or sell notes, it sent out a stereotyped circular to which even the name of E. R. Smith, the secretary, was printed, and which circular offered the notes for sale at 8% discount, and contained a recital that "in every case we hold good and sufficient security from the maker," and further quoted a clause from the by-laws, that "no discount of any paper shall

† To the point that there was no written agreement between the syndicate and the Union Loan & Trust Company touching the deposit of securities, Garretson testified (p. 819): "There was no contract executed between our syndicate and the Union Loan & Trust Company. The collaterals went there pursuant to an understanding." And on p. 772: "There was no written agreement." * * * "No, there was no agreement between the syndicate and the Trust Company."

To the point that the agreement to deposit the collaterals was but a verbal agreement between the members of the syndidate, Mr. Hornick testified (p. 904):

"Q. Now your understanding, I understood you to say, was that these collaterals were to secure the notes which you made or on which you were liable, is that it?

"A. Yes.

"Q. Was that arrangement in writing, or was it a verbal understanding?

"A. It was a verbal agreement.

"Q. Between the members of the syndicate?

"A. Between the members of the syndicate.

be made without having behind it good real or personal property security. No loan shall be made on individual names or endorsed paper," and further added that, "the securities for the loans sold are held by this company to protect it from possible loss as endorsers." ‡

‡ A copy of one of the stereotyped letters is found in the record, (pp. 942-3,) and is as follows:

"G. L. Joy, President; A. S. Garretson, Vice Prest.; E. R. Smith, Secretary. The Union Loan & Trust Company of Sioux City. Capital, $1,000,000.

"SIOUX CITY, Iowa, April 22, 1893.

"G. M. PHILLIPS, Cashier,

"Northfield, Minn.

"*Dear Sir:* We offer you the following described paper for discount 8 % with permission to charge interest for (three) days, time beyond maturity of notes; but no (charge) is to be made for exchange, as the notes are payable in current funds or (exchange).

"The above described notes are payable at Sioux National Bank, Sioux City, in current funds, or exchange on Boston or New York if desired.

"We handle no paper other than that of our regular customers. In every case we hold good and sufficient security from maker. We proceed upon the theory that if an individual or firm is strong and worthy of credit, such can put up security for borrowed money, and to no other class do we care to make loans.

"Section V of the by-laws governing the loaning committee or this Trust Company specifies that "no discount of any paper shall be made without having behind it good real or personal property security. No loans shall be made on individual names or endorsed paper." The securities for the loans sold are held by this company to protect it from possible loss as endorsers. We are careful in passing on securities, and to prove this will endorse the paper we offer, waiving protest.

"You can order by telegraph the notes desired (please order

It seems that this form of circular was used in every instance. §It is observed that it makes no ref-

by number) and if upon receipt of your order the paper has been taken, we will telegraph you so at our expense.

Very respectfully,

E. R. SMITH, Secretary."

§ E. R. Smith, Secretary and Treasurer of the Union Loan & Trust Company, testified (p. 821) that the Union Loan & Trust Company negotiated notes to eastern parties pursuant to the stereotyped circular letter. He further testified (p. 822):

"Q. Now I will ask you whether or no this railroad syndicate passed any paper through the Union Loan & Trust Company which was negotiated in pursuance of such circulars as this?

"A. It did.

"Q. I will ask you, Mr. Smith, who had charge of sending out such circulars as this?

"A. I did.

"Q. There is a blank space in the circular, apparently to be filled in. Was it customary to fill that in or not?

"A. Yes, sir; to fill in the names of the paper we had to offer."

On cross-examination Mr. Smith testified (p. 854):

"Q. There was no written signature to it?

"A. No; no written signature.

"Q. It was the printed signature of E. R. Smith, Secretary?

"A. Simply in the same type as the balance of the circular.

"Q. What was it?

"A. E. R. Smith, Secretary.

"Q. You said that you sent them out?

"A. Yes, sir; they were sent out under my direction."

Mr. Smith testified that he sent out about 10,000 of these circulars per month. (p. 824.)

Garretson also identified this circular letter as the stereo-

erence to the stock or bonds in controversy, and it is not proof that the company ever had possession of either the stock or the bonds. It was simply a declaration by E. R. Smith, the secretary, that the company had good and sufficient security from the makers of the notes, but the purchaser of a note on the faith and strength of this circular was never advised of the character of the security, and the purchaser of a note signed by any one of the members of the railroad syndicate would not have information that the syndicate stood behind that paper, nor that any of the railroad securities belonging to the syndicate either had been or would be deposited with the Union Loan & Trust Company as security for such paper. So far as the creditors of the Union Loan & Trust Company who had purchased notes from it, are concerned, they might have an equitable claim upon the securities which were then and there in the hands of the Union Loan & Trust Company, and while the same remained in the hands of the Union Loan & Trust Company as security for such notes, but it is an entirely different question whether they would have any claim upon securities which were not then and there deposited to secure such notes, or upon securities which the Union Loan & Trust Company voluntarily parted with to Garretson or other persons. The persons who bought notes from the Union Loan & Trust Company under the terms of the stereotyped circular, were relying upon the credit and standing of the Trust Company, and not upon the faith and credit of any particular securities, and could not have relied upon the faith and

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typed form of circular used by the Union Loan & Trust Co. (p. 696.)

credit of such securities, because they knew nothing of their character, nature or value. Furthermore, they had no knowledge, as a matter of fact, that any such securities were on deposit with the Union Loan & Trust Company.

III.

The Right of the Union Loan & Trust Company to Receive or to Retain the Stock and Bonds of the Railroad Companies was so Indefinite and Uncertain that the Union Loan & Trust Company Could not Predicateany Right Thereon.

There was no agreement or understanding, definite in its details, between the syndicate and the Union Loan & Trust Company, touching the deposit of the railroad securities to secure the syndicate paper. * Ac-

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* Garretson testified (pp. 772-3):

"Q. There was no written agreement?

"A. No.

"Q. And there was no formal agreements of any kind, was there?

"A. No, sir.

"Q. And when I say 'made loans,' I mean also as endorsing paper, the paper of the members of the railroad syndicate?

"A. No, there was no agreement between the syndicate and the Trust Company.

"Q. And the whole arrangement, whatever it was, was with Mr. Smith as representing the Union Loan & Trust Company, was it?

"A. Yes, sir.

"Q. And he was the person who in all these transactions represented the Union Loan & Trust Company?

"A. Yes, sir."

cording to the testimony of Mr. Hedges, the understanding to deposit securities with the Union Loan & Trust Company rested almost entirely in a conversation between Garretson and his associates before and at the time of the entering into the syndicate agreement for the construction of the Sioux City & Northern, July 3rd, 1889. † Nothing in particular seems to have

† Mr. Hedges testified (p. 1696): "It was agreed by the syndicate with Mr. Garretson that the securities that were to be received by the syndicate were to be placed with the Union Loan & Trust Company as security to them or for them until all the debts of the syndicate were paid; until the securities were sold and the debts were paid."

On cross-examination Mr. Hedges testified: (p. 1710).

"Q. Now, you said in your direct examination that it was understood that the Union Loan & Trust Company would endorse notes which the syndicate was to give. State how you got that understanding.

"A. Mr. Garretson told the syndicate.

"Q. Whom did he tell?

"A. Mr. Haakinson, Mr. Piatt, Mr. Booge and myself.

"Q. What?

"A. That the Union Loan & Trust Company would endorse paper of the syndicate and receive the railroad securities when they were obtained as collateral for the amount of the advances or the amount provided.

"Q. When was that conversation had?

"A. This was at the time the syndicate was formed.

"Q. When you embarked in the construction of the Sioux City & Northern Railroad?

"A Yes, sir."

That was all that witness remembers that took place at that time.

(p. 1711). "Mr. Garretson stated to us that the Union Loan & Trust Company would endorse the notes and provide

been said upon that subject at the time when Mr. Garretson embarked in the Nebraska & Western enter-

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the money and would receive the security as they were obtained." Further witness states that he understood that the syndicate notes were to be paid out of the proceeds of the sale of the securities.

"Q. And the conversation you are speaking of had reference to the Sioux City & Northern Railroad Company? The construction of that railroad?

"A. Yes, sir."

John Hornick testified (p. 891) touching the arrangement for the deposit of collateral with the Union Loan & Trust Company to secure syndicate paper for the construction of the Sioux City & Northern: "The arrangement was made that collateral, the bonds and stock of the road should be collateral for any notes that were signed and put out for that purpose, and they were to be placed in the Union Loan & Trust Company when issued and there remain as collateral.

"Q. You may state whether or not such collateral was placed with the Union Loan & Trust Company as such security?

"A. It was."

He further testified (p. 892): "I had conversations with E. R. Smith several times in his office, the Union Loan & Trust Company office, in reference to the collateral and whether it was there or not, and he assured me in every instance that it was placed there in the vault.

"Q. What if any conversation or arrangement did you have with him as to its remaining there?

"A. It was talked over in the presence of Mr. Garretson, the vice president of the Union Loan & Trust Company, and Mr. Smith as secretary, and myself and Mr. Hedges was present, that the collaterals should remain there and should not be removed only for sale, and if they were sold, the proceeds were to be returned to the Union Loan & Trust Company and credited to my account. I was very particular about that, because I was interested in having so much paper out."

prise. There was no agreement or understanding that the syndicate should borrow all the money necessary for its uses through the Union Loan & Trust Company. The syndicate was at liberty to borrow money elsewhere, and which right seems to have been recognized by the Union Loan & Trust Company. Without some definite agreement it would seem unreasonable that if the syndicate borrowed but one-half of the money through the Union Loan & Trust Company, necessary for the construction of the road, that the Union Loan & Trust Company should be entitled to the full issue of railroad securities for the limited amount of money

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He further testified: (p. 893).

"Q. And when the stock and bonds of the Sioux City & Nothern were issued, where were all of them placed, if you know?

"A. With the Union Loan & Trust Company.

"Q. For what purpose, if you know?

"A. For the purpose of securing the notes that I had signed for the syndicate."

Touching the deposit of the securities with the Union Loan & Trust Company, Mr. Haakinson testified: (p. 906).

The syndicate notes "were to be secured by the stocks and bonds of the Sioux City & Northern R. R. Co." He does not know that all of the stock and all of the bonds of the Sioux City & Northern were placed with the Union Loan & Trust Company. He only saw the stock which was issued in his name, and that stock he put with the Union Loan & Trust Company for the security of the John Hornick notes.

(p. 907):

"Q. Did you have any talk with E. R. Smith, the secretary of the Union Loan & Trust Company, as to the terms and conditions under which the collateral was placed there?

"A. I do not remember positively about that."

furnished. It seems to have been the understanding of the parties that the syndicate should carry to a conclusion such enterprises as it undertook, and was therefore at liberty to borrow money wherever it pleased, and whenever it became necessary to carry on its enprises, and the Union Loan & Trust Company recognized this right, and therefore permitted Garretson to withdraw the securities whenever he desired to do so, and either to sell the same or pledge the same to other parties as security for money, and that manner of doing business was continously carried on from the inception of the syndicate organization until the close of the transaction by which J. Kennedy Tod & Company acquired the title to the stock and bonds in controversy. *

* Garretson testified: (p. 819).

"Q. And was it a part of that understanding that you should have the collateral when you wanted it for the purposes of sale or pledge in advancing the interests of the syndicate?

"A. Hedges and myself did the negotiating for the selling of the securities, and we were in the habit of withdrawing those securities for sale or hypothecation elsewhere from time to time.

"Q. With the consent of Mr. Smith, the secretary and treasurer?

"A. There was never any protest, I believe, to our requests.

"Q. Well, you have stated before in your cross-examination that it was with his consent, did you not?

"A. I think it was with his consent.

"Q. At all events with his knowledge of what was to be done?

"A. Yes, sir.

"Q. Now, was it not your understanding that that was within the general arrangement with the Trust Company and the syndicate?

IV.

Under no Circumstances can the Intervenor Claim any Right to the Sioux City, O'Neill & Western Bonds, for it has Failed in Making Proof that it Discounted any Notes for the Railroad Syndicate the Proceeds of which went into that Property, Except a Possible Sum of $400,000.

There was no agreement or understanding between the syndicate and the Union Loan & Trust Company that the Nebraska & Western Bonds or the Sioux City,

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"A. Yes, sir, I am of that opinion." * *

(p. 820)

"Q. But you and Mr. Smith and the rest of you all acted on that assumption?

"A. I believe so.

On the point of the withdrawals of Sioux City & Northern securities from the Union Loan & Trust Company, Mr. Hornick testified: (pp. 895–6).

"Q. Now, as to some of these collaterals that were thus placed as security with the Union Loan & Trust Company for these railroad syndicate notes thus negotiated through the Union Loan & Trust Company, you may state if you know, whether any of these securities did pass out of the possession of the Union Loan & Trust Company?

"A. I do.

"Q. You may state whether at the time that they passed out, you knew of it?

"A. I did not.

"Q. You may state whether you consented to their being taken out before they were taken out?

"A. The facts were that Mr. Garretson took the collateral out and hypothecated it, and in the course of a month or six weeks, when it was necessary that we should know, he gave us the information.

"Q. What did you do then?

"A. We protested against it, and I told him it was not

O'Neil & Western bonds should be held as security for moneys which the Union Loan & Trust Company may have advanced and which went into other properties or

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right that he should remove the securities, that it was violating our contract and agreement.

"Q. Do you recollect what was the first security thus taken out of the Union Loan & Trust Company, of any large amount?

"A. I think it was the bonds of the Sioux City & Northern.

"Q. All or part of them?

"A. A part.

"Q. Have you learned since for what purpose they were taken out?

"A. Mr. Garretson informed us that he raised some money on his own name, but was obliged to use the collateral in New York. This was his excuse for removing the collateral."

To the point that John Hornick knew that these collaterals were to be sold, and that Garretson was the agent for the purpose of making the sales, and that Hornick never gave notice to or made objection to the persons with whom Garretson dealt that there was anything wrong in the sales or hypothecation, Hornick testified: (pp. 902-3-4).

The syndicate notes were to be paid "by the sale of the railroad collaterals.

"Q. Who was the financial manager of the syndicate?

"A. A. S. Garretson.

"Q. And who received the collateral when it came into the possession of the syndicate from time to time?

"A. A. S. Garretson."

The only collateral which Hornick personally received was "a fifth of the stock of the Sioux City & Northern." None of the other collateral was ever in his possession.

"Q. Was this certificate spoken of the only part of the

to other corporations. On the contrary it is distinctly made to appear that the understanding went no further than that the securities of each distinct property should

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collateral that you ever deposited with the Union Loan & Trust Company personally?

"A. Yes, sir. * *

"Q. Now, when you first learned that Mr. Garretson had hypothecated any of the Sioux City & Northern bonds, you said you objected?

"A. Yes, sir.

"Q. Who did you object to?

"A. I objected to Mr. Garretson and to Mr. Smith. * *

"Q. And did you notify or give any notice to the person with whom he had hypothecated them of any objection?

"A. No, sir.

"Q. Now, you knew of the $1,000,000 loan to J. Kennedy Tod & Co.?

"A. I knew it after a while.

"Q. About how long afterwards?

"A. Well, I could not say as to that; it was a short time.

"Q. A short time afterwards?

"A. Yes, sir.

"Q. Did you notify any one of any objection to that?

"A. Why I objected to having any —that it was not right. I objected to Mr. Garretson and to Mr. Smith that it was not right to put that collateral for a certain purpose, that is to secure my notes, and afterwards to take them out for another purpose.

"Q. Did you notify J. Kennedy Tod & Co. of any such objection?

"A. No, sir.

"Q. And you acquiesced or ratified what had been done?

"A. I did under protest. * * *

"Q. Did you know of the $1,500,000 loan?

"A. Yes.

go to secure advances made to those particular properties. That is to say, the stocks of the Sioux City & Northern might be deposited with the Union Loan &

"Q. And you signed the papers for that loan?

"A. I did, yes, sir.

Thus it affirmatively appears that John Hornick was an acting party to the pledge of the Sioux City, O'Neill & Western bonds to the $1,500,000, and he is one of the parties to the contract by which said bonds were transferred to the Bridge Company for its notes for $1,500,000 and which transferred the said notes and securities to Garretson (see contract p. 1733) and he thus knew that Garretson was to repledge the same to Tod & Co.

As to the removal of the collaterals, Mr. Haakinson testitified: (p. 909).

"Q. What permission or consent did you give to the removal of the collaterals from the Union Loan & Trust Company that had been thus placed there as security for this railroad syndicate paper?

"A. I do not remember that I gave any.

"Q. Did you know at the time any such collaterals were removed that they were going to be removed?

"A. No, sir.

"Q. Did you know of their removal prior to the facts of the removal of any that might have been taken away?

"A. No, sir.

"Q. Was it a part of any arrangement that you may have had with the vice-president that any of these collaterals should or might be removed from the office of the Union Loan & Trust Company after they had been placed there as security for the railroad syndicate indebtedness?

"A. Not that I can recollect."

Again, (p. 912):

"Q. And that the stock and bonds of that property were to be sold and the proceeds used to take up these notes?

Trust Company to secure advances made in the construction of that property, but such securities were not to be held as collateral to advances made to the Union Stock Yards Company, nor to the Sioux City Dressed Beef & Canning Company, nor to the Sioux City Ter-

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"A. Yes, sir.

"Q. And in that transaction Mr. Garretson was the active member of the syndicate, wasn't he?

"A. Yes, sir.

"Q. And you left it all to him?

"A. Yes, sir."

Mr. Hedges testified: (p. 1712) that he knew that Garretson had pledged $750,000 of the bonds of the Sioux City & Northern as collateral to the loan of August Belmont & Co., or Mr. Garretson's note that had been given therefor, and further that he acquiesced in and ratified that transaction. (p. 1714.)

"Q. You acquiesced, did you?

"A. Yes, sir.

"Q. After considering all the pros and cons, you ratified what he did?

"A. Yes, sir. * *

"Q. And was it understood that he was to sell the securities and clean it all up when he could?

"A. Yes, sir.

"Q. And he was entrusted with that part of the business?

"A. He was the financial agent of the syndicate.

"Q. And he was entrusted with that part of the business?

"A. Yes, sir."

Mr. Hedges also knew of the $1,000,000 loan from J. Kennedy Tod & Co. (p. 1712), and also knew of the $1,500,000 loan (p. 1713), and was one of the parties to the contract made with the Bridge Company in connection with that loan. (p. 1733.)

minal Railway & Warehouse Company; and likewise that the securities of the Nebraska & Western and the Sioux City, O'Neil & Western should not pass to the Union Loan & Trust Company as collateral security for advances which the Union Loan & Trust Company might make for the use of the other properties named. *

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* " Mr. Garretson in his testimony in behalf of the intervenor, testified: (p. 698).

"Q. Let me get at it another way, Mr. Garretson: Were any of the properties or securities acquired with the proceeds of funds credited to John Hornick, trustee, collateral security held by the Union Loan & Trust Company, for the benefit of any holders, or for its own benefit on endorsements of paper other than railroad syndicate paper?

"A. I think not.

"Q. Let me illustrate: On the failure of the Union Loan & Trust Company, would any of the proceeds of the notes that had been credited to Hornick, trustee, in the form of railroad securities or property, be applicable for the payment of any of the notes of the Stove Works, or Engine Works, or other properties doing business through the Union Loan & Trust Company?

"A. No, sir."

Again Mr. Garretson testified (p. 732):

"Q. Well, I may ask you how, in the absence of a memoranda, if you can explain the Terminal Company and the Bridge Company would be drawn into the Sioux City & Northern and the O'Neill & Western account?

"A. Those properties were not to my knowledge drawn into the account of John Hornick, trustee."

Again Mr. Garretson testified (p. 752):

"Q. I will ask you, Mr. Garretson, if you understood that all of the Sioux City Terminal Railway Company paper had its proceeds credited to John Hornick, trustee?

"A. No, sir; I did not understand that the Terminal Company paper was credited to John Hornick, trustee.

It appears from a report made by the creditors of the Union Loan & Trust Company by its special committee at Chicago under date of September 1st, 1893, that the outstanding notes sold by the Union Loan & Trust Company which that committee believed to be syndicate paper, aggregated $3,176,000, but it also appears from that report that $953,000 was Union Stock Yards paper and $283,500 was Sioux City Dressed Beef & Canning Company paper, and $718,000 was paper of the Sioux City Terminal Railway & Warehouse Company leaving paper signed by the syndicate outstanding and unpaid of Ed. Haakinson, $486,500, and of John Hornick $735,000, or a total of $1,221,500, of syndicate paper. †

But the question still remains whether any part of the notes signed by Haakinson or Hornick went into the Nebraska & Western property, so as to be entitled to an equitable claim upon any of the securities of that property.

"Q. Then what did you understand was the security of the Terminal notes at the time of the failure?

"A. A second mortgage (of the Terminal Company)."

It appears elsewhere in the record that there was a mortgage of the Terminal Company given to the Union Loan & Trust Company just before its failure.

† The extract from the report (p. 1047) is as follows:

"This $3,176,000 is made up in notes of persons and corporations as follows:

"Union Stock Yards Company	$953,000
"Edw. Haakinson	486,500
"Sioux City Dressed Beef & Canning Co	283,500
"John Hornick	735,000
"Sioux City Terminal Railway & Warehouse Co	718,000"

Mr. Smith (p. 844) makes a similar statement, except that he puts the Sioux City Dressed Beef & Canning Co. $273,500.

Under the syndicate agreement of February 15th, 1890, (p. 1037) it was only contemplated that the syndicate should advance on account of the Nebraska & Western property the sum of $350,000, $250,000 of which represented the loan by Garretson and Hedges to the Wyoming Pacific Improvement Company and $100,000 of which was on account of the subscription to Wyoming Pacific Improvement Company Trust certificates, but it does not positively appear that any part of this money came through the Union Loan & Trust Company,* nor that any of the Nebraska & Western bonds

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* Garretson was examined on this point (p. 805–6) and said the money to meet these obligations was borrowed through the Union Loan & Trust Company, but "don't know positively" that it ran into the account of John Hornick, trustee.

After Garretson had taken up the notes of the Wyoming-Pacific Improvement Company to an amount of $500,000, dated September 25th, 1890, secured by pledge of $1,000,000 Nebraska & Western bonds, and on May 16th, 1891, he requested the Manhattan Trust Company "to sell on his behalf and in satisfaction of said pledge the said $1,000,000 of bonds pledged as collateral security for the said $500,000 of notes at public auction," and a copy of said written request is in the record (pp. 1487–8).

On the same date, May 16th, 1891, Garretson gave notice to the Wyoming-Pacific Improvement Company that he would sell at public auction $450,000 of Nebraska & Western bonds and 25,833 shares of the stock of said company which had been pledged as security for certain promissory notes then held by him, the said Garretson, and which notice is in the record. (pp. 1488–9.) Attached to the notice is a schedule of the notes so secured, and the amount due thereon, aggregating $390,000, and which included the notes given to the Manhattan Trust Company, and to the British-American Trust & Finance Company set out at length in the record (pp. 1476–85).

had come into the possession of the Union Loan & Trust Company on account of this transaction. † According to the testimony of Amos T. French, the then Treasurer of the Manhattan Trust Co. all the bonds remained on deposit with his company. (p. 1278)

(pp. 1491–2): A. S. Garretson, under date May 28th, 1891, requested the Manhattan Trust Company by written notice to sell $500,000 of Nebraska & Western bonds held by him as collateral to Wyoming-Pacific Improvement Company notes aggregating $250,000, being the notes set out in the record at pp. 1474–5–6, and other exhibits relating to the sale of the Nebraska & Western bonds which had been pledged as collateral to loans made by the Wyoming-Pacific Improvement Company appear in the record at pp. 1486 to 1493.

† Garretson testified: (p. 702). "Our people, that is the railroad people, had loaned some $400,000 to the Wyoming-Pacific Improvement Company on $500,000 of the bonds of the Nebraska & Western Railway Company, and were therefore very deeply interested in the outcome of the undertaking on the other side of the river." He does not state that any part of this money came from the Union Loan & Trust Company, or that the Union Loan & Trust Company was in possession of these securities, and counsel for Mr. Hubbard, on receiving the above answer of the witness did not undertake to press this point any further, but was seemingly content to leave it in the obscurity in which the witness placed it.

On p. 696, Garretson did say: "That a portion of the bonds of the Nebraska & Western Railway Company were put in the Union Loan & Trust Company for money borrowed to help the people that were building that road at the time they were constructing it."

V

When the Railroad Syndicate Deposited the Railway Securities With the Union Loan & Trust Company, it was with the Understanding that the Railroad Syndicate Should Have the Right to Withdraw the Said Securities or Parts Thereof as Occasion Required to Raise Money Elsewhere, and that Understanding was Acted on During the Whole Course of the Business. *

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*Garreston testified: (rec. p. 696). "We put with the Union Loan & Trust Company all of our railroad securities as we came in possession of them, and we withdrew from the Union Loan & Trust Company various railway securities from time to time on which to raise money elsewhere."

Again (pp. 784-785) he testified:

"Q. Now then, you have spoken in your direct examination of your understanding as to these securities, or some of them, at some time being left with the Union Loan & Trust Company behind some of the syndicate paper; was it your understanding that you were authorized to use that collateral by sale, pledge or otherwise for the purposes of the syndicate?

"A. It has been the practice with our syndicate that Hedges and myself did the going round, to New York and St. Paul, and did the negotiations outside of the city for the syndicate.

"Q. My question is, whether you understood that you had the right to use the collateral, to use these securities by way of sale or pledge, in making the loans which you have testified that you procured upon them?

"A. The right derived from whom?

"Q. Well, was it your understanding that you had the right to do it?

"A. I did not know anything to the contrary.

"Q. You did not know anything to the contrary, and

A. S. Garretson from time to time negotiated and sold the railroad securities and delivered the same to the purchasers, and also hypothecated these securities with third parties to secure moneys borrowed, with the full knowledge and approval of the members of the syndicate, and with the full knowledge and approval of the Union Loan & Trust Company. Garretson sold the bonds of the Sioux City & Northern, $1,920,000, to J. Kennedy Tod & Company for 75c on the dollar, late in 1890 or early in 1891, * and the Union Loan & Trust

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then you believed, and it was your understanding, that you had the right to withdraw the securities which were withdrawn from the Union Loan & Trust Company, and to dispose of them as you did, did you?

"A. Yes, sir.

"Q. And you knew of no reason why you should not so use them?

"A. Yes, sir; I knew of no reason.

"Q. And you knew of no reason?

"A. I knew of no reason.

"Q. And as a matter of fact from the early part of 1890 down to April, 1893, you did, when it was considered desirable for the purpose of the enterprises or the syndicate, withdraw and sell or pledge the collaterals in the manner which you have described, did you not?

"A. Yes, sir.

"Q. And you did that with the knowledge of Mr. Smith, the Secretary and Treasurer of the Union Loan & Trust Company?

"A. Yes, sir.

* William S. Tod testified: (rec. p. 434).

"Q. Did you purchase from Garretson the bonds of the Sioux City & Northern?

"A. We did.

"Q. How much did you pay in cash for those bonds?

Company, by its Secretary and Treasurer, Mr. Smith, transmitted these bonds to Mr. Garretson in New York, as Garretson testified, that he might so sell the same. †

"A. 75 per cent. of their face value. * *

"Q. Are you able to state the amount on the face of those bonds?

"A. I think it was $1,920,000." (p. 435.)

J. Kennedy Tod testified: (rec. p. 470).

"Q. Now, what was your first transaction with Garretson?

"A. The purchase of the bonds of the Sioux City & Northern Railroad Company.

"Q. When was that?

"A. Either late in 1890 or early in 1891. I cannot give the exact date."

He also testified: (rec. p. 489).

"Q. When did you first learn that there were any such bonds?

"A. I think late in the year 1890.

"Q. What did you learn about them then?

"A. Mr. Garretson wanted to sell them."

† Mr. Garretson testified: (rec. p. 763).

"Q. Now, when the Sioux City & Northern bonds were sold, did you inform Mr. Smith of the sale?

"A. Yes, sir.

"Q. He knew all about it?

"A. Oh, yes.

"Q. And what proceeds were paid were credited on that account, I understood you to say?

"That was the instructions, yes, sir.

"Q. And the bonds had been delivered to you or sent to you in New York on your order by Mr. Smith, hadn't they?

"A. Yes, sir.

"Q. He knowing the purpose of their being sent there for sale?

"A. Yes, sir."

Before the Sioux City and Northern bonds had been sold by Garretson to J. Kennedy Tod & Co. Garretson in the summer of 1890 had sent the bonds to Boston for the purpose of being negotiated and sold, ‡ and many of the bonds had passed into the possession

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‡ Garretson testified: (rec. p. 701).

"Q. Do you know what was done with the Sioux City & Northern bonds when they were certified by the Manhattan Trust Company?

"A. I do not remember the date of their certification.

"Q. Well, where were they certified?

"A. In New York.

"Q. Well, do you recollect what was done with them then?

"A. I do not; I presume they were returned to Sioux City.

"Q. To the Union Loan & Trust Company?

"A. Beyond doubt.

"Q. Do you know what was next done with them?

"A. About midsummer of 1890 the bonds were looked into by some Boston people, Boston bankers, and on their request the bonds were listed on the Boston Stock Exchange, and they were sent to Boston for sale. I think this was about August or September, 1890.

"Q. Had there been any of them sold at that time?

"A. No, sir; there had been no sales made. * *

"Q. What was next done with them, or any part of them, so far as you know?

"A. Later on, $750,000 of the bonds were sent to the Manhattan Trust Company of New York, and the residue of the bonds were returned to the Union Loan & Trust Company of Sioux City.

"Q. Can you tell about when the $750,000 was sent to the Manhattan Trust Company in New York?

"A. About November 1st, 1890."

of other parties before the date when the negotiation of sale was concluded with J. Kennedy Tod & Co. Many of the bonds were delivered to J. Kennedy Tod & Co., by the Hanover National Bank and by the Manhattan Trust Company, and the proceeds of the sale were not returned to the Union Loan & Trust Company, but the Hanover National Bank received the money for the bonds which it presented, and the money for the bonds presented by Garretson and the Manhattan Trust Co. was credited by J. Kennedy Tod & Co., to the Sioux City & Northern Railroad Company. § The negotiation with J. Kennedy Tod & Co., was concluded by telegraph at a time when

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§ J. Kennedy Tod testified: (rec. p. 550.)

"I state that on the 16th day of January, 1891, the Hanover National Bank delivered to my firm $500,000 of Sioux City & Northern Railway Company first mortgage five per cent. bonds, for which my firm paid that bank $376,041.66, being at the rate of 75 %, and accrued interest from the first day of January, 1891. On February 3rd, 1891, the Hanover National Bank delivered to my firm a second lot of $500,000 of Sioux City & Northern first mortgage 5 % bonds, for which we paid that bank $377,222.22, being at the rate of 75 % and accrued interest. February 17th, 1891, my firm received from A. S. Garretson and the clerks of the Manhattan Trust Company $920,000 of Sioux City & Northern Railway Company first mortgage 5 % bonds. My firm credited the account of the Sioux City & Northern on the books of J. Kennedy Tod & Co. with $695,877.78, being at the rate of 75 % and accrued interest.

"Q. Credited whom?

"A. The Sioux City & Northern Railway Company."

Garretson was in St. Paul, and on the recommendation of James J. Hill. ¶

When Garretson was cross-examined with reference to the application of the proceeds arising from the sales of the bonds of the Sioux City & Northern, he did not state that any of those proceeds were turned over to the Union Loan & Trust Company, but only that probably a part of the proceeds were so turned over. *

¶ Garretson testified: (p. 723).

"The final or concluding part of the negotiations were by wire from St. Paul.

"Q. Where were you in St. Paul at that time?

"A. I was at the Great Northern office doing business at that time.

"Q. Was there anybody that was acting as intermediary in the trade in any way.

"A. We were in conference with Mr. Hill at that time about the value of the securities and the necessity of making a sale, etc., and it resulted in making an offer to J. Kennedy Tod & Co. of 75%. * *"

"The interview, as I remember it, ended in this way; that we offered the bonds at 75% and accrued interest, and I understand that Mr. Hill did recommend to Tod & Co. by correspondence or dispatch at the same time that they make the purchase." (rec. p. 724).

* Mr. Garretson testified: (rec. p. 761).

"Q. And then you said that the Sioux City & Northern bonds were sold by you and the proceeds were credited on that account, I understood you to say?

"A. Sioux City & Northern bonds were sold later, and a portion of the avails of the Sioux City & Northern bonds only probably were applied to the credit of that account. At this moment I don't just remember what portion.

"Q. I understood you to say in your direct examination

Again, before J. Kennedy Tod & Co. had purchased the bonds of the Sioux City & Northern Railway Company, Garretson had hypothecated many of the bonds to the Manhattan Trust Company to secure money borrowed on his own promissory notes. As early as November 1st, 1890, Garreston had so borrowed of the Manhattan Trust Company $500,000, secured by $750,000 of the Sioux City & Northern Railway bonds, and on February 14th, 1891, had borrowed $90,000, secured by $170,000 of Sioux City & Northern Railway bonds. The $500,000 loan was represented by ten promissory notes, each for $50,000, and each secured by $75,000 of Sioux City & Northern Railway Company bonds, and other notes were given at about the same time by the said Garretson, likewise secured by the Sioux City & Northern Railroad Company bonds. *

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that the proceeds of the sale of the Sioux City & Northern bonds almost squared that account. Was or was not that so?

"A. Well, I do not think that was exactly my testimony in that case. You see, there was $750,000 of the bonds which was up at New York for borrowed money there to the Manhattan Trust Company.

"Q. That is earlier. I speak of the time when you sold the bonds to Kennedy Tod & Co.

"A. That was before the bonds were sold, very true, but the avails of them had to take up that amount of paper; in the meantime I think there was some loaned at the Manhattan Trust Company which had matured that had to be paid out of the avails of the Sioux City & Northern sale. I cannot tell you what proportion of that money came to the Union Loan & Trust Company. The officers of the Trust Company can tell you "

* Amos T. French testified: (rec. p. 623).

"Q. Will you please state the loans from Manhattan Trust Company to A. S. Garretson that were at any time se-

VI.

The Union Loan & Trust Company Voluntarily Parted with the Railroad Securities that may have come into Their Possession and Recognized the Right of A. S. Garretson to Withdraw the Securities and Deal with the Same as his Individual Property.

The Union Loan & Trust Company, by E. R. Smith, its Secretary and Treasurer and practical manager,

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cured by the Sioux City & Northern bonds, giving the dates, the amount of the loans and the amount of the bonds as collateral?

"A. November 1st, 1890, loan of $500,000, on $750,000 Sioux City & Northern bonds; February 14th, 1891, loan of $90,000 on $170,000 of Sioux City & Northern bonds."

Ten notes for $50,000 each, dated November 1st, 1890, are shown to the witness and identified as the notes signed by Garretson and payable to the Manhattan Trust Company. (p. 624.) One of said notes is found in the record, (p. 670.) There is also in the record (pp. 672-3) a note from Garretson to the Manhattan Trust Company under date of February 14th, 1891, for $100,000, secured by $170,000 of Sioux City & Northern bonds, and also (p. 674) a note for $90,000 under date of February 14th, 1891, secured by $170,000 of Sioux City & Northern Railroad Company bonds.

Mr. Amos T. French, the second vice-president of the Manhattan Trust Company, testified: (rec. p. 578.) that he remembers of receiving the Sioux City & Northern bonds as collateral to a loan made by the Manhattan Trust Company to A. S. Garretson.

"Q. The first loan was a half million dollars to A. S. Garretson and the collateral was $750,000 of bonds of the Sioux City & Northern?

"A. Yes.

recognized the right of A. S. Garretson to receive and dispose of the bonds of the Sioux City & Northern. * 1920 of the bonds of the Sioux City & Northern had come into the possession of the Union Loan & Trust Company before they were certified by the Manhattan Trust Company, and on February 24th, 1890, E. R. Smith, Secretary, transmitted these bonds to the Manhattan Trust Company for the purpose of being certified. * On the same day A. S. Garretson directed the

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"Q. When was that, as nearly as you can state?

"A. I think it was November 1st, 1890.

"Q. From whom did you receive the Sioux City & Northern bonds?

"A. I have not the faintest idea. Mr. Garretson produced the bonds there."

The requests to the Manhattan Trust Company by J. Kennedy Tod & Co. for the appointment of a receiver and for the foreclosure of the mortgage on the Sioux City & Northern, are found in the record at pp. 676–7.

* Garretson testified: (p. 786), That Mr. Smith exercised an independent judgment and action, and that he (Garretson) kept Smith informed of the loans which Garretson was making in New York, and as to the sale of the Sioux City & Northern bonds in New York, and the pledge of the stock in New York, and that when he (Garretson) wanted these securities for the purpose of carrying out those negotiations he went to Smith or sent to him and got them.

* (p. 1503) SIOUX CITY, Iowa, Feb. 24, 1890.

F. O. FRENCH, Prest., 10 Wall Street, New York, N. Y.

Dear Sir: We forward you today to your company by American Express bonds of the Sioux City & Northern R. R. Co. No. 1 to 1920 inclusive, $1,000 each, only lacking trust certificate of your Co. to make them complete. Kindly acknowledge receipt to us and oblige, Yours truly,

E. R. SMITH, Secretary."

Manhattan Trust Company to certify 1920 bonds of the Sioux City & Northern and hold the same subject to his order. † The Union Loan & Trust Company, by E. R. Smith, Secretary, recognized the right of Garretson to claim the 1920 bonds of the Sioux City & Northern, and on March 12th, 1890, directed the Manhattan Trust Company to issue its receipt for the said bonds to A. S. Garretson, ‡ and which receipt the Manhattan Trust Company accordingly issued. § It would appear

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† (p. 1504) SIOUX CITY, Iowa, Feb. 24, 1890.

J. I. WATERBURY, ESQ., V. Pt.

Dear Sir: The bonds of the S. C. & N. R. R. Co., 1920 in number, have been executed by the officers of the Co. * * * Please certify to the bonds and hold same subject to my order. * * *

Yours very respectfully,

A. S. GARRETSON."

‡ (p. 1503) SIOUX CITY, Iowa, March 12, '90.

F. O. FRENCH, ESQ., President Manhattan Trust Co., 10 Wall Street, New York City.

Dear Sir: Some days since we shipped you by express 1920 bonds, $1,000 each of the Sioux City & Northern Railroad Co., the receipt of which was duly acknowledged by your secretary. We would like to have your company issue a receipt for these bonds to A. S. Garretson and forward to him and advise us when done. By so doing you will greatly oblige,

Yours truly,

E. R. SMITH, Secretary."

§ (p. 1512) March 15, 1890.

E. R. SMITH, ESQ., Secretary, Union Loan & Trust Co., Sioux City, Iowa.

Dear Sir: We beg to acknowledge receipt of your letter of the 12th instructing us to issue a receipt for the bonds of the Sioux City & Northern Railway Co., and for which we have given receipt to you of February 28th, 1890, is duly received.

from this transaction, and by the letters set out in the foot notes hereto that the Union Loan & Trust Company was only the custodian of these 1920 bonds for the accommodation of Mr. Garretson, and not as claimant that the bonds had been deposited with it as security for syndicate notes. When the Union Loan & Trust Company transmitted the bonds to the Manhattan Trust Company for certification, it did not request that the bonds should be returned to it, as it would most naturally have done if it had had any claim thereto or right to possession thereof, but simply requested a receipt from the Manhattan Trust Company, and then afterwards directed the Manhattan Trust Company to issue a receipt to A. S. Garretson, which would plainly indicate that the Union Loan & Trust Company recognized Garretson as the owner of and entitled to the possession and control of the bonds. On the 26th of August, 1890, Garretson directed the Man-

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We have forwarded such receipt to Mr. A. S. Garretson and request that the receipt sent to you on that date be canceled and returned to us.

Respectfully,

J. I. WATERBURY, Vice-Prest.

(p. 1512) March 15th, 1890.

A. S. GARRETSON, ESQ.,

Sioux City, Iowa.

This is to certify that we have received from the Union Loan & Trust Company of Sioux City, Iowa, nineteen hundred and twenty (1920) bonds of the Sioux City & Northern Railroad Company, Nos. to 1920 inclusive, for which a receipt was given to the Union Loan & Trust Company February 28th, 1890.

MANHATTAN TRUST COMPANY,

By J. I. WATERBURY, V.-Pt."

hattan Trust Company to ship these bonds to the Boston Safe Deposit & Trust Company, Boston, Mass. These bonds, when delivered to the Boston Safe Deposit & Trust Company, were to be held by it subject to the order of F. V. Parker & Co.,[¶] and the bonds

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‖ (p. 1504) SIOUX CITY, Iowa, Aug. 26, 1890.

J. I. WATERBURY, ESQ., Vice Pt. Manhattan Trust Co.
New York City, New York.

Dear Sir: * * * Please cut off July 1st coupons from Sioux City & Northern bonds in safety vaults and express coupons to me. You can cancel them if you wish, as they will be canceled here if not canceled by you. Please count and box the bonds and deliver them to an express company for shipment to the Boston Safe Deposit & Trust Company, Boston, Mass. * * * Please wire me the day you deliver the bonds to the Express Co. Very respectfully yours,

A. S. GARRETSON."

¶ (p. 1505) SIOUX CITY, Iowa, Sept. 12, 1890.

A. T. FRENCH, ESQ., Tr., No. 2 Nassau Street, New York City, N. Y.

Dear Sir: I have your telegram of the 12th in which you state that you directed the Boston Safe Deposit & Trust Company to hold the bonds subject to the order of the Sioux City & Northern Railroad Company. I should have stated in former letters to Mr. Waterbury that the bonds were to be held subject to the order of F. V. Parker & Co., as the bonds have been sent to Boston at his request. The Sioux City & Northern Railroad Company do not own the bonds. They are owned by Messrs. D. T. Hedges, Ed. Haakinson, J. E. Booge, John Hornick and myself, one-fifth each, and they are in my hands and under my control. I have wired you today to authorize the Boston Safe Deposit & Trust Company to hold the bonds subject to the order of F. V. Parker & Co.

Very respectfully,

A. S. GARRETSON, for Owners.

were accordingly delivered to F. V. Parker &. Co. * These are the same bonds which Garretson subsequently sold to J. Kennedy Tod & Co. for 75c on the dollar late in 1890 or the spring of 1891, and it was $750,000 of these same bonds that Garretson pledged to the Manhattan Trust Company at the time when he borrowed the $500,000 to take up the note to August Belmont & Co.

The Union Loan & Trust Company also voluntarily parted with the stock of the Sioux City and Northern Railroad Company from time to time at the request of Garreston, and E. R. Smith as the secretary and treasurer and practical manager of the Union Loan & Trust Company, transmitted certificates for shares of stock of the Sioux City & Northern to J. Kennedy Tod & Co., * and should not now be heard to com-

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*(p. 1506) BOSTON, September 13, 1890.

A. T. FRENCH, ESQ., Treas.

Dear Sir: We have your favor of the 12th; and also the $1,920,000 Sioux City & No. bonds for which we have given the Bos. Safe Deposit & Trust Co. a receipt.

Yours very truly,

F. V. PARKER & Co.

*There is in the record (p. 655) a letter from J. Kennedy Tod & Co. to E. R. Smith, Secretary of the Union Loan & Trust Company, which contains the following:

"*Dear Sir:* We beg to acknowledge receipt of your favor of the 8th inst. enclosing certificate for 5,000 shares of Sioux City & Northern R. R. Co., stock. * * * * Your arrangement for the further delivery to us of 200 shares of this stock is quite satisfactory. Yours truly,

J. KENNEDY TOD & Co."

plain that J. Kennedy Tod & Co. were wrongfully in possession of the stock.

The gist of this action on the part of Hubbard as

Also on p. 662 the following letter:

"SIOUX CITY, Oct. 8, 1891.

"J. KENNEDY TOD & Co., 45 Wall Street, New York.

"*Gentlemen:* We are in receipt of a telegram from Mr. A. S. Garretson requesting us to send you $520,000 stock of the Sioux City & Northern Railroad Company as collateral to a loan which he is making with you. We have not certificates in hand so that we can send you just that amount, but send by express $500,000 of stock of that company and will endeavor to get the balance, $20,000, as soon as we can get one certificate divided up. You can consider in the meantime that we are holding that amount of stock in trust for you.

"Very truly yours,

E. R. SMITH, Secretary."

Also on p. 656 the following letter:

"26 Oct., 1891.

"A. S. GARRETSON, ESQ.,

Sioux City, Iowa.

"*Dear Sir:* Referring to the agreement of 1st October, 1891, we beg to advise you that 7,200 shares of $100 each of the capital stock of the Sioux City & Northern Railway Co. have been delivered to us in negotiable form.

"Yours very truly,

J. KENNEDY TOD & Co."

Also on p. 657 the following letter:

"26 October, 1891.

"E. R. SMITH, Secretary Union Loan & Trust Co.,

"Sioux City, Iowa.

"*Dear Sir:* We beg to acknowledge receipt of your favor of the 22nd inst. enclosing certificates for 2,700 shares of stock of the Sioux & Northern Railway Co. endorsed in blank. As requested we send you today by registered mail cer-

assignee of the Union Loan & Trust Company is that Garretson wrongfully withdrew the securities in question from the Union Loan & Trust Company, and with-

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tificates or 2,500 shares of the stock of the same company, the receipt of which please acknowledge.

"Yours very truly,

J. KENNEDY TOD & Co."

Also the following letter:

"3 December, 1891.

"E. R. SMITH, ESQ., Secretary Union Loan & Trust Co., Sioux City Iowa.

"*Dear Sir:* We beg to acknowledge receipt of your favor of the 30 ult., with 3555 shares of Sioux City & Northern Railway Company stock, which we receive for account of Mr. A. S. Garretson.

"Yours very truly,

J. KENNEDY TOD & Co."

Also the following letter: (p. 665.)

"SIOUX CITY, Iowa, Nov. 30, 1891.

"J. KENNEDY TOD & Co.,

"45 Wall Street, New York City, New York.

"*Gentlemen:* Agreeable to request of A. S. Garretson we enclose herein the following certificates stock the Sioux City & Northern Railway Company, to-wit: (then follows a list of 3555 shares.)

"Yours truly,

"E. R. SMITH, Secretary."

Also the following letter: (p. 652.)

"SIOUX CITY, Iowa, Jan. 16, 1893.

"J. KENNEDY TOD & Co.,

"45 Wall Street, New York City.

"*Gentlemen:* Enclosed herein please find certificate of stock in the Sioux City & Northern R. R. Co., No. 44 in the name of A. S. Garretson, trustee, 500 shares, and No. 45, A. S. Garretson, trustee, 500 shares. Kindly send us your receipt

out authority pledged the same to J. Kennedy Tod & Co.. * The correctness of this charge is denied by Mr. Garretson, as a witness for the intervenor, and the position asserted by him and the other members of the railroad syndicate was that they had the right to withdraw these securities and to sell or pledge the same on the market. †

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for same and oblige. We send these in compliance with Mr. Garretson's request.

"Yours very truly,

"E. R. SMITH Secy."

Garretson and Hedges negotiated a sale of $360,000 of Sioux City & Northern stock to J. J. Hill for the sum of $350,000, $200,000 of which was applied in payment of the debts of the Terminal Company, and $150,000 to the payment of syndicate paper. (See Garretson's testimony, pp. 752-3.)

*Garretson testified: (p. 796.)

"Q. Well, are such facts true?

"A. Not to my knowledge and belief."

†Garretson testified: (p. 797.)

"I do not think that any member of the syndicate felt that he was doing wrong when asking the Union Loan & Trust Co. for the securities on which to borrow money elsewhere. * * * We always regarded the bonds of the two roads for sale, and the three-fourths interest in the stock of the Sioux City & Northern for sale latterly.

"Q. Now then, my question was, was it from the outset the intention of the syndicate, and the understanding of all its members, that the bonds and stock were to be sold or pledged in the interest of the syndicate and in carrying out its enterprises so far as necessary?

"A. They were put in pledge from the beginning.

"Q. No, but I mean was it understood that while

VII

The Wyoming-Pacific Improvement Company Acquired all the Bonds of the Nebraska & Western Railway Company and Hypothecated the Same for Money to Construct the Nebraska & Western Railroad.

Neither the railroad syndicate nor the Union Loan & Trust Company had any connection with the Nebraska & Western Railway Company at its inception. ¶ The Nebraska & Western Railway Company was organized in 1889, and on the first day of July, 1889, made and executed its mortgage to the Manhattan Trust Company to secure its issue of bonds. * The

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they may have been from time to time with the Union Loan & Trust Company, nevertheless they were to have the right to use them for sale or pledge according to the interest of the syndicate in developing its enterprises?

"A. That understanding was had among the members of the syndicate."

(p. 798)

"Q. And the Union Loan & Trust Company acted on that theory?

"A. On our request, yes, sir."

¶ Garretson and others were subscribers to a fund that was raised in Sioux City at the outset of this enterprise evidently in the form of a donation to the railroad company. pp. 563–564.)

*Amos T. French, second vice-president of the Manhattan Trust Company, testified that the issue of bonds under the mortgage of the Nebraska & Western, under date of July 1st, 1889, to the Manhattan Trust Company, was in the neighborhood of $2,500,000, or about $2,580,000, and that he examined and had knowledge of the certification of the bonds. (pp. 544–5.) And on p. 1278 states the correct amount to be $2,583,000, and on p. 1289 repeats and verifies the same.

Nebraska & Western Railway Company then entered into an agreement with a construction company under the name of the Wyoming-Pacific Improvement Company, † to construct and equip the road, which construction company was to receive therefor the bonds of the company as issued, and to that end the Manhattan Trust Company was instructed to deliver the bonds to the Wyoming-Pacific Improvement Company when issued and certified to by it. ‡ Thus the Wyoming-

† The construction contract with the Wyoming-Pacific Improvement Company is found in record (pp. 1564–6) and which provides for the delivery of the bonds $20,000 per mile, in part payment for construction and Amos T. French testified (p. 544) the Wyoming-Pacific Improvement Company constructed the line from Sioux City to O'Neill, Nebraska, 129 miles in length. The Nebraska & Western Railway Company was the name of the company which was to construct the line westward to the state line of Wyoming. This company was incorporated about the same time as the Wyoming-Pacific Improvement Company.

‡ The amount of the issue of Nebraska & Western bonds was 2,583, of $1,000 each. (p. 445, and p. 1278 and p. 1289.)

Mr. Waterbury, the president of the Manhattan Trust Company, testified (rec. p. 446) that the Nebraska & Western bonds, after they were certified by the Trust Company, were delivered to the Improvement Company.

(p. 1501.)

MANHATTAN TRUST COMPANY,
No. 10 Wall Street, City.

Gentlemen: Please deliver the bonds of the Nebraska & Western Railway Company, when properly executed by you as provided in the mortgage to your company, to the Wyoming-Pacific Improvement Company, at the rate of $20,000 per mile.

NEBRASKA & WESTERN RAILWAY COMPANY,
T. W. TOMLINSON, Secretary,
By MILLARD R. JONES, President.

Pacific Improvement Company became the owner of all the bonds of the Nebraska & Western Railway Company. The Wyoming-Pacific Improvement Company then cast about to either sell the Nebraska & Western bonds or to borrow money on the same, and entered into a contract or trust agreement with the Manhattan Trust Company under date of Feb. 1, 1890, under which the Manhattan Trust Company secured for the Wyoming-Pacific Improvement Company on its notes, loans of money to the amount of $1,050,000, for which the Manhattan Trust Company held said bonds, as trustee, as security for the said loans in the ratio of two dollars in bonds to one dollar of money loaned. §

§ On the first day of February, 1890, the Wyoming-Pacific Improvement Company entered into a written agreement with the Manhattan Trust Company as trustee, which recited that whereas the Improvement Company had obtained subscriptions for a loan of $1,000,000, the Manhattan Trust Company, acting for all parties, was to collect from the lenders and pay over the amounts of said loan, and that said advances of money were to be secured "by first mortgage bonds of the railway company which bonds are to be earned and issued under the provisions of a mortgage made by the railway company to the Trust Company as trustee, bearing date the first day of July, 1889, * * * and hereby absolutely transfers and sets over unto the said Manhattan Trust Company as collateral security for the payment of all advances to be made, all bonds earned or that may at any time be earned, and all and singular all interest or claim to such bonds now owned or hereafter to be acquired by said Improvement Company, until the Trust Company, as trustee is fully secured by $2,000 of bonds at par for each $1,000 of principal of advances." The said instrument further contains the usual provisions as to the sale of the collaterals upon default. This contract is found in the record at pp. 1462-6.

At the date of the above trust agreement between the Wyoming-Pacific Improvement Company and the Manhattan Trust Company, an underwriter's agreement was entered into between the Wyoming-Pacific Improvement Company and the persons who were subscribers to said loans, by which the loans were made upon the faith of the trust agreement of Feb. 1st, 1890, between the said Improvement Company and the Manhattan Trust Company before referred to, and the subscribers to said underwriter's agreement for loans were August Belmont & Co. $500,000, Theodore A. Havemeyer $100,000, F. O. Matthiessen $100,000, Manhattan Trust Company $100,000, A. S. Garretson $125,000 and D. T. Hedges $125,000; total, $1,050,000. ‖ A. S. Garretson

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‖ The form of the underwriter's agreement being that which was signed by Garretson and Hedges is found in the record, pp. 1468–9.

Mr. Waterbury testified: (rec. p. 447) that there was an agreement for a loan of about $1,000,000 to the Wyoming-Pacific Improvement Company, of which amount Rothschild & Son signed for $500,000, Havemeyer $100,000, Matthiessen $100,000, Garretson $125,000, Hedges $125,000, and the Manhattan Trust Company $100,000.

"Q. Now, just what was that loan or agreement for a loan?

"A. It was just what it says. It was a loan of money against a deposit of securities.

"Q. What were the securities deposited?

"A. Nebraska & Western bonds and Nebraska & Western stock." * * *

Again on p. 448 he testified that the $1,050,000 was paid in cash, and that the August Belmont & Co. loan was for N. W. Rothschild & Co.

Mr. French testified: (p. 560.) "It was a loan of $1,050,000,

and D. T. Hedges as such subscribers, severally became entitled to bonds to the amount of $250,000, but with this transaction the other individuals who were members of the railroad syndicate had no direct connection, and these interests of Garretson and Hedges were their

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as I remember, which was to be secured by this $2,000,000, or $2,100,000 of bonds," and again, (p. 562) that the $2,100,000 of bonds were deposited with the Manhattan Trust Company as trustee to secure the parties making the loan.

Wendell Goodwin testified: (p. 1185.) He was president of the Wyoming-Pacific Improvement Company and negotiated a loan for $1,000,000 to the Improvement Company in the spring of 1890.

(p. 1186): He identifies the loan agreement with the Manhattan Trust Company, found on pp. 1462 to 1466, and the supplemental agreement on pp. 1466 to 1468, and the underwriter's agreement signed by Garretson and Hedges, pp. 1468 to 1470.

(p. 1187): The Improvement Company issued its notes under these loan agreements to the amount or $1,050,000, the amounts whereof were actually paid to the Improvement Company, to-wit:

August Belmont & Co	$500,000
Manhattan Trust Company	100,000
F. O. Matthiessen	100,000
T. O. Havemeyer	100,000
Garretson	125,000
Hedges	125,000

(p. 1189): There was an additional loan of from $450,000 to $500,000, evidenced by notes

June 30, 1890	$110,000
August 1, 1890	100,000
September 19, 1890	100,000
October 1, 1890	50,000
November 1, 1890	50,000
November 1, 1890	50,000

For copies of these notes see pp. 1476–8–9–81–2–3.

respective individual interests; hence the Union Loan & Trust Company could have no claim on these bonds as being part of the railroad securities which the railroad syndicate was to deposit with it as collateral security for the syndicate notes.

It appears that soon after the underwriter's agreement above referred to had been entered into, the Wyoming-Pacific Improvement Company needed additional assistance, and the individuals composing the so-called railroad syndicate aided the Improvement Company to the extent of $100,000, in addition to the $125,000 subscribed to the underwriter's agreement by Garretson and Hedges respectively. ¶ But it does

¶ On p. 1037 is found an agreement under date of February 15th, 1890, signed by D. T. Hedges, A. S. Garretson, J. E. Booge, John Hornick and Ed. Haakinson, which recites: "It is therefore agreed by all the parties hereto that they will raise the sum of $350,000 in whatever manner as may be agreed upon orally between the parties hereto, and use the same to further the immediate construction of the said Pacific Short Line from Sioux City to O'Neill in the following manner, to-wit: First, loan to the Wyoming-Pacific Improvement Company the sum of $250,000 based upon a deposit of first mortgage bonds of the Nebraska & Western Railway Company to the amount of $500,000 which are held by the Manhattan Trust Company of New York City in trust for said loan of $250,000. * * * In addition to the aforesaid loan of $250,000, it is proposed to advance the sum of $100,000 as subscribers to the trust certificates of the Wyoming-Pacific Improvement Company being the entire amount of subscriptions made by the parties to this contract, and all of said certificates aggregating the sum of $100,000 are to be assigned to the parties having paid in thereon to this syndicate which certificates and the avails of the loans to the Wyoming-Pacific Improvement Company are to be received the

not appear with certainty that any part of this money came through the Union Loan & Trust Company, nor that the Union Loan & Trust Company came into possession of or became entitled to the Nebraska & Western bonds that were pledged by the Improvement Company to Garretson or to the syndicate to secure these advances. *

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same as the stocks and bonds of the Sioux City & Northern Company and held in a pool for the benefit of the parties hereto."

It is evident that "the aforesaid loan of $250,000" refers to the loan of Garretson and Hedges to the underwriters' agreement, and Garretson so testified, (p. 818,) and that the additional $100,000 was to be by way of subscriptions for stock of the Nebaska & Western Railway Company, which the Improvement Company held under its construction contract. For a form of the subscription cetificate, see pp. 1038–9.

* The intervenor endeavored to show by Garretson that this $500,000 of Nebraska & Western bonds which Garretson and Hedges were entitled to as security for their loans of $125,000 each, should have gone to the Union Loan & Trust Company, but the witness did not so state. The answer of Garretson to that question is as follows: (p. 698.) "There was $500,000 of the bonds of the Nebraska & Western Railroad Company sent from New York by the Wyoming-Pacific Improvement Company or the Manhattan Trust Company to Sioux City on which an advance of $250,000, pursuant to an underwriting agreement of D. T. Hedges and myself, was to have been made. Owing to the necessities, however, of the parties building that road at that date, an advance was made up to something over $400,000, if I remember rightly, by the same names or from among the same names as I have given." After this form of answer, counsel seems to have abandoned his attempt to trace these bonds, or the right of the Union Loan & Trust Company thereto.

VIII.

When the Notes Given Under the Underwriter's Agreement Became Payable, the Wyoming-Pacific Improvement Company was Unable to pay the Same and A. S. Garretson took up said Notes and thus Acquired the Nebraska & Western Railway Bonds which had been Deposited with the Manhattan Trust Company to Secure said Notes and he Repledged the said Bonds to Secure his own Notes upon which he Borrowed Money to take up the Notes Given Under the Underwriter's Agreement.

When the notes given under the underwriter's agreement became payable, the Wyoming-Pacific Improvement Company was unable to pay the same. A. S. Garretson was desirous of acquiring control of all the Nebraska & Western bonds. About the 1st of November, 1890, it became necessary to provide for the payment of the loans of August Belmont & Co. under the underwriter's agreement. On that date A.

Amos T. French, then treasurer of Manhattan Trust Co. testified: (p. 1278) $2,100,000 of Nebraska & Western bonds remained with his company as trustee behind the loan for $1,050,000, and the remaining $483,000 were held by the Manhattan Trust Company at the direction of Improvement Company as collateral for further loans.

On June 30, 1890, the Wyoming-Pacific Improvement Company gave its note to the Manhattan Trust Company for $110,000, secured by $450,000 of Nebraska & Western bonds, as recited in the note (pp. 1476–7, and Mr. French testified (p. 1302) that $450,000 of the remaining $480,000 of bonds were the bonds so pledged to secure the last above mentioned note, and that the additional notes appearing in the record (pp. 1478 to 1485) were secured by the same bonds.

S. Garretson borrowed through the Manhattan Trust Company $500,000 on his ten individual notes for $50,000 each, said notes being dated November 1st, 1890, and secured by $750,000 of Sioux City & Northern bonds, and with which said loan he took up the loan of Belmont & Company of $500,000. * At the date of

* One of said notes is found in the record (pp. 670–2) and bears date November 1st, 1890, runs to the Manhattan Trust Company, and recites that it is secured by $75,000 of Sioux City & Northern bonds. Touching this transaction Amos T. French testified: (p. 623.)

"Q. Will you please state the loans from the Manhattan Trust Company to A. S. Garretson that were at any time secured by the Sioux City & Northern bonds, giving the dates, the amount of the loans and the amount of the bonds as collateral?

"A. November 1st, 1890, loan of $500,000 on $750,000 Sioux City & Northern bonds; February 14th, 1891, loan of $90,000 on $170,000 Sioux City & Northern bonds.

Again: (p. 624.)

"Q. I will ask you to examine the ten notes I hand you signed A. S. Garretson, dated New York, November 1st, 1890, each for $50,000, payable four months after date to the Manhattan Trust Company, and state if those are the notes that make up the $500,000 loan of which you have given testimony?

"A. I presume they are, they are dated November 1st, 1890, notes of A. S. Garretson, secured by the Sioux City & Northern bonds, and paid February 17th, 1891."

Mr. Garretson testified: (p. 703) That the $500,000 loan taken up was "at the office of August Belmont & Co.," and that when he reached home he made a report to his associates that he had put up with the Manhattan Trust Company as collateral to his notes $750,000 of Sioux City & Northern bonds. By this transaction (p. 703) Garretson acquired the se-

the above transaction, November 1st, 1890, Mr. Garretson had negotiations with Mr. French and Mr. Waterbury touching the other loans to the Wyoming-Pacific

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curity behind the Belmont loan, "a million and seventy-five or eighty thousand dollars, if I remember rightly."

"Q. In what form was this security?

"A. It was the bonds of the Nebraska & Western Railway." (p. 704.)

Simply stated, the transaction was this: Garretson put up with the Manhattan Trust Company $750,000 of Sioux City & Northern bonds and received from Belmont & Co. when he paid their loan, Nebraska & Western bonds in excess of $1,000,000. Mr. Garretson again testified: (p. 724.)

"Q. I show you ten notes, all dated November 1st, and payable to the Manhattan Trust Company or order, each for $50,000, and each having four months to run, and each purporting to be secured by $75,000 of Sioux City & Northern R. R. first mortgage 5% bonds, and ask you if those are the notes which you gave to the Manhattan Trust Company for the acquisition of the Belmont loan?

"A. Yes, sir."

The notes are offered in evidence as petitioner's exhibit 9, from letters A to J, consecutively.

(p. 657): December 1st, 1890.

"A. S. GARRETSON, ESQ.,

Sioux City, Iowa.

" *Dear Sir:* We beg to advise you that we have received 750 bonds of $1,000 each of the Sioux City & Northern Railway Co., delivered to us as collateral against your notes of November 1st, 1890, aggregating $500,000.

Yours very truly,

J. I. WATERBURY,

Vice Prest."

When the $500,000 loan was made Nov. 1, 1890, the $750,000 bonds referred to were in Boston for sale and Garretson had

Improvement Company under the underwriter's agreement to the effect that the Manhattan Trust Company should cause said loans to be renewed by the parties holding the same, or that said loans should be placed elsewhere, and that the Nebraska & Western bonds in the possession of the Manhattan Trust Company should be used as collateral to such renewals. † Subsequently,

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given an order on the Boston parties to turn over the bonds or proceeds to Manhattan Trust Co., see letter of Garretson (p. 1560).

John I. Waterbury testified: (p. 1426.) The Sioux City & Northern bonds were not sold in Boston, which fact I learned early in December, 1890, and thereupon wrote the letter to Garretson (p. 1124). This letter is as follows:

December 5th, 1890.

A. S. GARRETSON, ESQ.,
Sioux City, Iowa.

Dear Sir: Referring to our conversation of yesterday morning, I wish to confirm what I then said to you, that in our late negotiations we were informed the bonds of the Sioux City & Northern Railroad were sold, and we accepted an order for the proceeds. We must insist on the proceeds of any sale being turned over to us, as the proceeds were pledged to us to the extent of $500,000.

Yours very truly,
J. I. WATERBURY,
Vice President.

After this there followed the contract of January 28th, 1891, between Garretson and the Manhattan Trust Company (p. 1106) and which is more particularly referred to hereafter.

† (p. 950) NEW YORK, Nov. 1st, 1890.

A. S. GARRETSON, ESQ.

Dear Sir: In reference to the loans of the Wyoming-Pacific Company not matured in New York, viz: $200,000 maturing December 8th, 1890, and certain loans due the Man-

and for the purpose of enabling Garretson to more effectually carry out his plan of taking up the notes of the Wyoming-Pacific Improvement Company and ac-

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hattan Trust Company, we agree with you that the loans in the Manhattan Trust Company shall be renewed and that the others of the loans shall be renewed by the parties holding them, or that the same shall be placed elsewhere, the renewal notes to be made by the Wyoming-Pacific Improvement Company or by you. If necessary, this arrangement to cover one year from date. In carrying out any of these renewals we shall be authorized to use all the bonds and stock of the Nebraska & Western R. R. Co., there being held in all $2,080,000 of bonds and about $2,600,000 stock.

"Yours truly,

F. O. FRENCH,

J. I. WATERBURY."

John I. Waterbury testified: (pp. 1426–7.) When Garretson took up the Belmont notes for $500,000, he received the $1,000,000 Nebraska & Western bonds collateral thereto, which he handed over to the Manhattan Trust Company with instructions to hold them as collateral to the loans. "They were held as collateral to the loans of the Trust Company, the British-American Trust & Finance Corporation, the United States Transfer & Exchange Association, and the remaining loans under the $1,050,000 loan."

To take up the Matthiessen and Havemeyer loans, the underwriter's loaned to the Wyoming-Pacific Improvement Company $270,000, behind which as collateral there were $695,000 of bonds, being the bonds described in those notes.

In Schedule "A" of the agreement of January 28th, 1891, between Garretson and the Manhattan Trust Company (p. 1109) is found a statement of the loans then existing and the disposition of the collateral, which shows Nebraska & Western bonds then in the possession of the Manhattan Trust Company to the amount of $2,083,000, which included all the bonds outstanding

quiring for himself the Nebraska & Western bonds, on January 28th, 1891, he entered into a further agreement in writing with the Manhattan Trust Company ‡ pro-

except the $500,000 which had been transmitted to Mr. Garretson to secure himself and Mr. Hedges on account of their loans of $500,000.

‡ On the 28th day of January, 1891, Garretson entered into a written agreement with the Manhattan Trust Company for itself and as trustee for parties holding the notes of the Wyoming-Pacific Improvement Company, which agreement recites that Garretson had already advanced to the Wyoming-Pacific Improvement Company large sums of money, and was the holder of certain of the Nebraska & Western bonds as security therefor, and that the Manhattan Trust Company had made like advances secured by Nebraska & Western bonds, and that said Garretson "proposes to purchase the various outstanding loans secured by such bonds," and which contract further recites that Garretson has purchased the notes and claims of the Manhattan Trust Company against the Wyoming-Pacific Improvement Company and has paid therefor $300,726.72, and has received the bonds, stocks and securities held as collateral by the Manhattan Trust Company, and that Garretson "further agrees at or before the maturity of the other notes or loans to purchase and take up all of the outstanding notes of the Improvement Company and receive the securities held as collateral therefor," and that Garretson thereby would become the holder as collateral of large amounts of the bonds of the Nebraska & Western Railway Company; and said contract further recites that "inasmuch as the said first party (Garretson) by the purchase of such loans becomes the holder of a large majority, if not all of the bonds of the Nebraska & Western Railway Company, and it is for the benefit of all parties that an adjustment of the affairs of the said Nebraska & Western Railway Company, by the foreclosure thereof or otherwise, be had, and that the affairs of the Wyoming-Pacific Improvement Company be adjusted," and the said agreement further recites that "this agreement and the settle-

viding for the taking up of the then outstanding notes and receiving to himself the collateral held as security therefor. §

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ment herein made is in full adjustment and settlement of all questions heretofore arising between the parties hereto, in reference to the said Improvement Company or the construction of the Nebraska & Western Railway Company, and the first party agrees that his note for five hundred thousand dollars ($500,000) heretofore given on taking up certain loans shall be paid at or before maturity." (For copy of this agreement see pp. 1106–8.)

Schedule "A" attached to the agreement (p. 1109) contains a list of the notes which Garretson was to take up under said agreement, and which are summarized as follows: Notes to the Manhattan Trust Company under date of November 1st, 1890, aggregating $296,331.14, secured by $592,000 of the bonds of the Nebraska & Western and 25,832 shares of stock. Notes to British-American Trustee & Finance Company Limited, to the amount of $150,000, dated November 1st, 1890, secured by $300,000 Nebraska & Western bonds. Note to the United States Transfer & Exchange Association, dated August 22, 1890, for $40,000, secured by $80,000 of said bonds. Notes to Wendell Goodwin for $25,000 secured by $49,000 of said bonds, and notes to various other persons aggregating $270,000 secured by $695,000 of said bonds. Belmont notes taken up, $500,000, to which there remained as collateral $367,000 of said bonds. The amount of the Nebraska & Western bonds so outstanding to be taken up, according to schedule "A" above, aggregated $2,083,000.

§ Mr. Garreston testified (p. 707) that he took up all the notes outstanding under the underwriter's agreement, and further testified (p. 767) that the contract of January 28, 1891, adjusted all the differences between himself and the Manhattan Trust Company, and that he proceeded thereafter to take up the loans of the Wyoming-Pacific Improvement Company secured by the Nebraska & Western bonds, and that in order to assist him in so doing, the Manhattan Trust Company discounted

Garretson, to obtain the money necessary to take up such of the Wyoming-Pacific Improvement Company paper as it was necessary then to pay, borrowed certain moneys from the Manhattan Trust Company, on which loans he deposited in pledge as security Nebraska & Western bonds to the amount of $1,308,000 and 25,830 shares of Nebraska & Western stock. ‖ Where it was practicable for Garretson to renew outstanding paper or to borrow money from other persons to meet the same, he did so from time to time, and in June and July, 1891, gave a large number of such notes secured by Nebraska & Western bonds. ¶ From an examination

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some of his personal paper produced in evidence, and also loans made by J. Kennedy Tod & Co., and that after he had taken up a considerable part of the paper of the Wyoming-Pacific Improvement Company, he instructed Strong & Cadwallader to sell out the collateral for his account, and in that way he possessed himself of the title to the Nebraska & Western bonds. To the same effect see Garretson's testimony, (p. 726).

‖ (p. 659.) "January 29, 1891.

"Received of A. S. Garretson 1308 bonds of $1,000 each of the Nebraska & Western Railway Company, and 25,830 shares of the capital stock of the Nebraska & Western Railway Company of par value of $100 each, to be held as collateral security to certain loans this day made to him upon the terms provided in the notes representing the same.

"MANHATTAN TRUST COMPANY,

"J. I. WATERBURY, V. Pt."

¶ Garretson took up the notes of the Wyoming-Pacific Improvement Company in many instances by giving his own notes secured by collateral, many of which are set out in the record from pp. 951 to 987, of which the following is a tabulated statement showing the date of the note, to whom given, the amount, and the collateral:

of these loans through the Manhattan Trust Company, and of the notes given to various persons by Garretson on which he borrowed money to take up the Wyoming-Pacific Improvement Company paper, and by which he acquired the Nebraska & Western bonds, it appears

1891.	To whom given.	Amt. of Note.	Collateral.
July 31,	J. Kennedy Tod & Co.	$ 76,000.	$ 200,000 Neb. & W. bonds.
June 15,	Jno L. Cadwallader	18,000.	50,000 " " " "
June 15,	J. F. Alexander	4,500.	13,000 " " " "
June 15,	T. M. Logan	9,000.	25,000 " " " "
June 15,	G. W. Stetson	9,000.	25,000 " " " "
July 31,	H. W. O. Edye	20,400.	51,000 " " " "
July 31,	Manhattan Trust Co.	12,500.	500 shares S. C. & N.
July 31,	Manhattan Trust Co.	12,500.	500 " " " " "
July 31,	Manhattan Trust Co.	12,500.	500 " " " " "
July 31.	Manhattan Trust Co.	12,500.	500 " " " " "
July 31,	U. S. Trans. & Ex. Assn.	36,360.	80,000 Neb. & W. bonds.
July 31,	Manhattan Trust Co.	23,000.	58,000 " " " "
July 31,	British-A. Tr. & F. Co.	47,470.	
July 31,	Arthur B. Graves	5,000.	13,000 " " " "
July 31,	British-A. Tr. & F. Co.	9,090.	23,000 " " " "
July 31,	John L. Cadwallader	18,180.	45,000 " " " "
July 31,	J. F. Alexander	5,100.	13,000 " " " "
July 31,	T. M. Logan	5,100.	13,000 " " " "
July 31,	C. F. Tagg	10,200.	25,000 " " " "
July 31,	A. S. Rosenbaum	10,200.	25,000 " " " "
July 31,	John I. Waterbury	22,725.	83,000 " " " "
July 31,	Francis O. French	90,900.	250,000 " " " "
June 15,	British-A. Tr. & F. Co.	47,000.	93,000 " " " "
June 15,	Manhattan Trust Co.	23,000.	93,000 " " " "
June 15,	U. S. Trans. & Ex. Assn.	9,000.	25,000 " " " "
June 15,	H. W. O. Edye	27,000.	75,000 " " " "
June 15,	Clarke, Dodge & Co.	18,000.	50,000 " " " "
June 15,	A. S. Rosenbaum	13,500.	37,000 " " " "
June 15,	C. F. Tagg	13,500.	37,000 " " " "
June 15,	A. B. Graves	9,000.	25,000 " " " "
June 15,	John I. Waterbury	22,500.	83,000 " " " "
June 15,	Francis O. French	90,000.	250,000 " " " "
June 16,	U. S. Trans. & Ex. Assn.	36,000.	80,000 " " " "
Jan. 29,	British-A. Tr. & F. Co.	100,000.	1,215,000 " " " "
			2,583,000 " " " stock.

affirmatively that Garretson did not borrow the said money either by himself or by the railroad syndicate through the Union Loan & Trust Company, and it does not seem possible that E. H. Hubbard, as assignee of the Union Loan & Trust Company could lay any claim to the Nebraska & Western bonds. The only thing possible that could have come through the Union Loan & Trust Company up to this date in the proceedings would have been the $250,000 with which Garretson and Hedges met their loans under the underwriter's agreement of February 1st, 1890, and the additional $100,000 which the railroad syndicate furnished to the Wyoming-Pacific Improvement Company under the contract of February 15th, 1890. (p. 1037). *

The intervenor charges that the Manhattan Trust Company perpetrated a fraud upon Mr. Garretson at the time when Garretson first entered into negotiations to assume or take up the obligations of the Wyoming-Pacific Improvement Company, in this, that it misrepresented to Garretson the amount of the indebtedness of the Wyoming-Pacific Improvement Company by making to him a statement which Garretson found to be $300,000 less than the amount of the actual liabilities of that company; but the officers of the Manhattan Trust Company directly and positively deny that they made any such misrepresentation. †

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* For evidence on this point see the closing part of paragraph IV, *supra*.

† Mr. Garretson claims that this misrepresentation was made at a meeting held at the Fifth Avenue Hotel, at which Mr. Goodwin, representing the Improvement Company, and Mr. Waterbury, representing the Manhattan Trust Company, were present, but these gentlemen deny the correctness of the testi-

In any event, this charge of fraud can be of no avail to the intervenor, for subsequently Garretson entered into the written contract with the Manhattan Trust Company under date of January 28th, 1891, in the 8th paragraph of which it is set down, "This agree-

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mony given by Mr. Garretson. Mr. Goodwin testified: (pp. 1192-3.) We made a proposition to Garretson that the property would be turned over to him on the terms, such terms as were mentioned, which were practically the taking up and assuming of the obligations, and he asked about what the obligations or liabilities of the corporations were, and to the best of my knowledge and belief I stated to him about $1,700,000 here in New York, that there were certain obligations which showed on the books of account in Sioux City where they were kept, and those I could not give him in detail or in amount, but that he could get them all.

"Q. Did Mr. Waterbury make any statement to him as to the obligations of the company?

"A. Only backing up in a general way those that I made. * *

"Q. Is that all that was said with regard to the obligations of the company, that you have given?

"A. To the best of my recollection, yes, sir.

"Q. Is it true that either you or Mr. Waterbury gave Mr. Garretson a statement of the obligations of that company at that time except the general one you have spoken of?

"A. As I remember, no.

"Q. Is it true that either you or Mr. Waterbury gave to Mr. Garretson a statement of the liabilities of that company which was about $300,000 short of the actual amount of the obligations and liabilities?

"A. We did not.

"Q. Is it true that you made him any statement of the liabilities of that company which was an untrue statement?

"A. It is not.

(p. 1207): Were you aware of any securities, either the

ment and the settlement herein made is in full adjustment and settlement of all questions heretofore arising between the parties hereto, in reference to the said Improvement Company or the construction of the Nebraska & Western Railway, and the first party agrees that his note for $500,000 heretofore given on taking up certain loans shall be paid at or before maturity" (p.

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stock of the Wyoming-Pacific Improvement Company or the bonds of the Nebraska & Western Railroad Company, or any engagement to deliver either ever having been in the Union Loan & Trust Company?

"A. Never.

"Q. Never heard of such thing?

"A. No, sir."

(p. 1214): "I swore today that I stated (to Garreston) the thing (the indebtedness of the Improvement Company) exactly as it was represented on the books here, and as far as the obligations that were covered by this New York end and the loans. I stated to him exactly as they were, but I reserved that right and so stated to him, as to what obligations there were in Sioux City would appear on the books there." The construction account was kept in Sioux City.

"Q. Well, do you mean to say that you convinced him to buy the road for taking this indebtedness?

"A. That was Mr. Garretson's own proposition. He took it exactly as it was stated to him at that time." We stated to him the obligations, as we had them, were about $1,700,000.

(p. 1215): "Garretson had kept himself familiar with the progress of that work from the first and was very active and kept himself informed of what was going on in Sioux City. He also kept himself in touch with all the matters here, and practically as much as we did."

(p. 1220): On this page is explained the bonds which were put up behind the additional loans, $450,000, to-wit: the notes beginning on p. 1476.

1108), and for the further reason that knowledge of this pretended fraud is not traced to J. Kennedy Tod & Co., and if it were, it is immaterial to the issues between the parties to this litigation.

After Garretson had become the holder of the Wyoming-Pacific Improvement Company obligations and the Nebraska & Western bonds pledged as security for the same, to further perfect his title thereto (default having been made) he caused the said bonds to be sold in the Real Estate Exchange in the City of New York, on May 27th, 1891, and June 24th, 1891, by Edwin H. Muller & Son, pursuant to a demand made upon the Manhattan Trust Company, as trustee, and pursuant to notices given to the Wyoming-Pacific Improvement Company, † and at which sale A. S. Garretson pur-

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John I. Waterbury, President of the Manhattan Trust Company, testified (p. 1418): $2,100,000 Nebraska & Western bonds were behind the $1,050,000 loan, and that the remainder of the bonds were held by the Manhattan Trust Company and were pledged as security for other notes which are there enumerated and set down.

John I. Waterbury testified: (p. 1451.)

"Q. Prior to the execution of the contract between the Manhattan Trust Company and A. S. Garretson, dated January 28th, 1891, has Mr. Garretson made complaint in regard to the representations of yourself and Mr. Goodwin, as to the amount of the indebtedness of the Nebraska & Western Railroad?

"A. I made no representations regarding the indebtedness of the Nebraska & Western Railroad, because I know only of the indebtedness represented by the contract loan and what was due to the companies that I have mentioned this morning. Mr. Garretson never complained to me nor to the Trust Company, or to any one else, so far as I know."

† Some of said notices are found in the record from p. 1486 to p. 1493.

chased all the bonds of the Nebraska & Western Railway Company, and thereby acquired absolute title in himself. ‡

IX.

On October 1st, 1891, A. S. Garretson Entered Into a Contract with J. Kennedy Tod & Co. to Borrow $1,000,000, to be Secured by the Nebraska & Western Bonds and $720,000 of the Stock of the Sioux City & Northern. *

This contract recites that Garretson is the holder of $2,500,000, or thereabouts, of Nebraska & Western bonds and 25,000 shares of the stock of the Nebraska &

‡ Andrew J. McCormick, a clerk for Muller & Son, and whose business it was to keep the record of said sales, testified (p. 1242) that the books show that on May 27th, 1891, there was sold two blocks of bonds to A. S. Garretson, one being for $1,000,000 and one for $450,000, and he further testified (p. 1243) that on June 3rd, 1891, there was sold to A. S. Garretson $500,000 of Nebraska & Western bonds, and on June 24th, 1891, $675,000 of Nebraska & Western bonds. Garretson testified (p. 726) that the bonds at this sale were acquired in his name.

* See contract of October 1st, 1891, rec. pp. 646 to 651.

Garretson testified (p. 779): "The proceeds of the $1,000,000 loan took up all of the obligations which I had in New York," being the notes set out in the record at pp. 952 to 988, and which are the notes given by Garretson to take up the Wyoming-Pacific Improvement Company paper (p. 737). "Well, my memory is they took up notes of the Wyoming-Pacific Improvement Company.

"Q. In the acquisition of the Nebraska & Western properties by you?

"A. Yes, sir."

Hedges said (p. 1712) that he knew of this $1,000,000 loan and that Garretson reported to his associates that he had got a $1,000,000 loan from Tod & Co.

Western, and 7,200 shares of the stock of the Sioux City & Northern, and that proceedings are pending for the foreclosure and sale of the Nebraska & Western Railway, and that Garretson is desirous of purchasing the said road and forming a new corporation and obtaining a new issue of stocks and bonds, and of borrowing money to carry out said enterprise, and J. Kennedy Tod & Co. agree to make or procure him a loan upon the following terms:

First: Garretson agrees to deliver to J. Kennedy Tod & Co. his 200 prommissory notes of $5,000 each, same to be dated October 1st, 1891, and payable on demand, and to deposit as security for the common and equal benefit of all who shall become holders thereof $2,500,000, or thereabouts, of Nebraska & Western bonds, and 25,000 shares of Nebraska & Western stock, and 7,200 shares of Sioux City & Northern stock.

Second: J. Kennedy Tod & Co. agree to procure the notes to be sold at par, and to advance thereon at once $200,000.

Third: The collateral described shall be held by J. Kennedy Tod & Co. as trustees for the equal benefit of the holders of the notes.

Fourth: Upon the reorganization of the Nebraska & Western under the foreclosure, a new mortgage shall be executed to the Manhattan Trust Company to secure a new issue of bonds at the rate of $18,000 per mile, and the whole amount of such issue, $2,340,000, and one-half of the capital stock shall be delivered to J. Kennedy Tod & Co. in the place and stead of the Nebraska & Western bonds and stock. In the event that the Nebraska & Western bonds are to be deposited in court, the road is to be purchased in the name of the

trustees and until such new corporation shall be formed and new bonds and stock delivered, no more than $600,000 on the $1,000,000 loan shall be paid over to Garretson, but same shall remain to his credit with the banking company.

The notes representing this $1,000,000 loan were not executed on the first day of October, 1891, but were thereafter prepared and sent to Mr. Garretson at Sioux City, and were there executed by him, and were received in New York by J. Kennedy Tod & Co. on the 26th day of October, 1891. †

At the date of the execution of this contract of October 1st, 1891, $1,000,000 of bonds of the Nebraska & Western were in New York, and were delivered to J. Kennedy Tod & Co. on the 19th day of October, 1891, and on October 27, $150,000 which had been delivered to the St. Charles Car Co. and the remainder of the

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† See letter of J. Kennedy Tod & Co. to A. S. Garretson under date of October 26th, 1891, (p. 993) acknowledging the receipt of 200 notes of $5,000 each, and notifying Garretson that his account has been credited with $1,004,166.67. "When we hear by letter from Mr. Wickersham regarding the delivery of the bonds and stock of the Nebraska & Western Railway Company, we will send you a receipt covering these securities. In the meantime we enclose a formal receipt for 7,200 shares of Sioux City & Northern Railway Company stock which have been delivered to us."

Exhibit 53, p. 1024: "NEW YORK, Oct. 26, 1891.

"Sold for account of A. S. Garretson, Esq., by J. Kennedy Tod & Co., 45 Wall Street.

$1,000,000 D-notes of A. S. Garretson	$1,000,000
Int. from Oct. 1, 25 days, 6%	4,166.67
	$1,004,166.67

Nebraska & Western bonds which were pledged behind the $1,000,000 loan were in Sioux City, perhaps on deposit with the Union Loan & Trust Company as custodian for A. S. Garretson, subject to his order and control, and were to remain there until the coming on of the foreclosure sale October 23rd, 1891, to avoid the expense of shipping them to New York in the meantime, and their subsequent return to Omaha to be used at the time of the sale, but which bonds Mr. Garretson was to turn over to George W. Wickersham as the attorney and agent of J. Kennedy Tod & Co. prior to such foreclosure sale, and which was accordingly done. ‡

‡ Touching the delivery of the Nebraska & Western bonds to secure this loan, W. S. Tod testified (p. 1353): On October 19th, 1891, we received from the Manhattan Trust Company $800,000 of the bonds, and $200,000 of the bonds from our cashier. These latter bonds had been pledged under a loan of $76,000 made with us. The $1,000,000 of bonds so received we transmitted on the same date to Mr. Wickersham at Omaha, to be used in buying in the Nebraska & Western Railroad property. On the 27th of October, 1891, Mr. Wickersham received from Mr. Garretson at Omaha in our behalf the remainder of the bonds, (p. 1354) less $150,000. "On the 27th of October, 1891, we received $150,000 bonds from the Merchants' National Bank, and on the same day these bonds were sent to Mr. Wickersham at Omaha. This accounts for the total of $2,583,000 bonds."

(p. 1527) "OMAHA, NEBRASKA, October 22, 1891.

"J. KENNEDY TOD & CO., 45 Wall Street, New York.

"Box containing 1423 bonds and all stock forwarded by borrower from Sioux City today. He has given me order on express company for them. Will get them in the morning.

"GEORGE W. WICKERSHAM."

(p. 1527) "OMAHA, NEBRASKA, October 23, 1891.

"J. KENNEDY TOD & CO., 45 Wall Street, New York.

"Borrower has delivered to me box said to contain about

The intervenor endeavors to make it appear by the testimony of Mr. Smith that all of the bonds at this time were in the custody of the Union Loan & Trust Company, and were by Mr. Smith transmitted to Mr.

1400 bonds and all stock. Shall have no time to count them until later in day, but have no doubt they are as represented.

"GEORGE W. WICKERSHAM."

(p. 1529) "NEW YORK, Nov. 4, 1891.

"J. KENNEDY TOD & Co., 45 Wall Street.

"*Dear Sirs:* * * * I returned this morning from the west and have now to report to you my proceedings in your interest there, and in Sioux City.

"On arriving in Sioux City, I had an interview with Mr. Garretson and procured his signature to the loan agreement dated Oct. 1st, and also to the 200 demand notes of $5,000 each, which were dispatched to you by Adams Express on Wednesday, October 21st, and which doubtless reached you two or three days later. Proceeding then to Omaha, I received, as already acknowledged by telegraph, $1,000,000 in the Nebraska & Western R. R. Co. first mortgage bonds, sent by you from New York per Adams Express. A day or two later Mr. Garretson delivered to me $1,433,000 in the same bonds, and a certificate No. 51 for 25,831 shares of the Nebraska & Western Railway Company. The railroad was sold at auction pursuant to the decree of the U. S. Circuit Court, District of Nebraska, on Friday, October 23rd, and was purchased by Garretson and myself as trustees for the holders of the first mortgage bonds of the Nebraska & Western Railway Company. * * * On Friday, 30th inst., the remaining 150 bonds arrived, and I deposited the entire issue, $2,583,000 with the clerk of the U. S. Circuit Court, upon which the court entered a decree confirming the sale * * *

"Very respectfully yours,

GEORGE W. WICKERSHAM."

Garretson at Omaha to be used in the foreclosure sale, and that Mr. Wickersham got possession of the bonds either wrongfully or with notice of the claim of the

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W. S. Tod testified: (p. 1355.)

"Q. Well, so far as the bonds which were reported by Mr. Wickersham to have been delivered to him for your account in Omaha, was the delivery to him there the result of a previous arrangement or not?

"A. I believe it was the result of a previous arrangement to save the expense of shipping bonds to New York and sending them to the west again."

Garretson testified (p. 769) that at the time of the $1,000,000 loan from J. Kennedy Tod & Co., the bonds "were largely in the hands of J. Kennedy Tod & Co., but half a million of them were at the Union Loan & Trust Company behind the loan of the Wyoming-Pacific Improvement Company of $250,000, which had run up to something like $400,000.

"Q. Now, what was done with this $500,000 of bonds that were in Sioux City?

"A. They were sent to Omaha at the same time the other bonds were sent.

"Q. Who sent them?

"A. Mr. Smith.

"Q. At your request?

"A. It was either my request or the request of some member of the syndicate.

"Q. You told Mr. Smith of the $1,000,000 loan, of course?

"A. Yes, sir.

"Q. He knew all about it?

"A. Yes, sir."

(p. 1125): (telegram) October 22, 1891.

"A. S. GARRETSON,

"Paxton House (Omaha).

"Wickersham advises execution all papers, they have not arrived yet, but if you deliver stock and balance of bonds to him, we will place cash at his disposal.

Union Loan & Trust Company. The letters and telegrams in the preceding foot note disprove this charge. It further appears from the testimony of Mr. Garretson that the bonds which were at Sioux City were by him delivered to Mr. Wickersham, as the representative of J. Kennedy Tod & Co., to complete the pledge under the $1,000,000 loan, § and it further appears from the

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"J. KENNEDY TOD & Co."

(p. 1126): (telegram) October 23, 1891.

"A. S. GARRETSON,

"Paxton House, Omaha, Nebraska.

"Telegram received. Have telegraphed National Bank of Commerce authorizing your drafts on us for one hundred thousand dollars. * * Will expect delivery from St. Charles Car Company on Monday. J. KENNEDY TOD & Co."

(p. 994): Telegram Garretson to Tod, October 23, 1891: "150 bonds yet in New York held by St. Charles Car Co. I have arranged with them to-day to surrender them to you Monday next. Balance of the bonds here subject to order of Mr. Wickersham."

(p. 1126): 27th October, 1891.

"A. S. GARRETSON, ESQ.,

"Sioux City, Iowa.

"*Dear Sir:* We have received from you this forenoon a telegram reading as follows: 'St. Charles advises me that they ordered the bonds delivered to you yesterday. Please let me hear from you.' * * The Merchants' Bank has now delivered bonds. * * Have forwarded them by Adams Express to Wickersham, care First National Bank of Omaha. * *

"J. KENNEDY TOD & Co."

§ Garretson testified: (p. 769–70.)

"Q. Did you not deliver these bonds to me (Mr. Wickersham) as the representative of J. Kennedy Tod & Co. in order to complete the pledge of the bonds under the $1,000,000 agreement?

testimony of the collection clerk and the paying teller of the First National Bank of Omaha, that the bonds

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"A. I guess those bonds were to be included behind the $1,000,000 loan.

"Q. The $1,000,000 loan covered all of the Nebraska & Western bonds, didn't it?

"A. It seems to.

"Q. Now, then, is it your recollection that you delivered those bonds to me on behalf of J. Kennedy Tod & Co. in Omaha?

"A. I presume I did.

"Q. Then, Mr. Garretson, you and I acted as a committee to purchase the property?

"A. Yes, sir.

"Q. Of the Nebraska & Western R. R. at the foreclosure sale?

"A. Yes, sir.

"Q. With the understanding that I represented the interests of J. Kennedy Tod & Co. as pledgees of the bonds and you as pledgor of the bonds, was it not?

"A. I think so.

"Q. Then didn't we afterwards deposit the bonds with the court in exchange for the deed?

"A. Yes."

W. S. Tod Testified: (p. 1388). The whole of the bonds were to be pledged to J. Kennedy Tod & Co. under the $1,000,000 loan. The property was to be sold within a short time, and it was not considered possible to deliver the bonds, all of the bonds to J. Kennedy Tod & Co. in New York, in order that they might be pledged, so we arranged that Mr. Wickersham should act for J. Kennedy Tod & Co., practically as their agent, and the delivery made to him in Omaha would have the same effect as delivering them to J. Kennedy Tod & Co. in pledge. When we had received some of the bonds in New York, and he in our behalf received the rest of the bonds in Omaha, the effect,

actually passed into the possession of Mr. Wickersham and were by him deposited in court to complete the purchase of the Nebraska & Western.

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so far as we were concerned, was that all of the bonds were pledged under the $1,000,000 loan.

(p. 1389): "Q. Now, at the time of the delivery of the bonds to you, or when you were advised of the delivery of the bonds or any of them to Mr. Wickersham in Omaha on your account, had you knowledge of any claim on the part of any other person than Mr. Garretson to those bonds?

"A. None whatever, we had no knowledge of any claim by any other party. I believed and still believe that those bonds belonged to Mr. Garretson."

John H. Bexten, collection clerk of the First National Bank of Omaha, testified (p. 1718) touching the deposit in the bank by Mr. Wickersham of certain sealed packages, on October 22nd and October 24th, 1891, and which were withdrawn by Mr. Wickersham about the same dates.

Frank N. Clark, paying teller for the First National Bank, testified (p. 1721) that the Express Company brought into the bank for safe keeping a large shipment of bonds. Within a short period the agent of the Express Company returned to the bank with Mr. George W. Wickersham, to whom he said the packages belonged. "He then turned them over to Mr. Wickersham, and then Mr. Wickersham took our receipt." I thought the packages came from the east, but did not check them up to see where they came from. (p. 1722): The bank records show that on October 24th, 1891, the bank received an envelope said to contain stock certificates and a package said to contain bonds. There were three original packages which the express company left in my keeping which the agent turned over to Mr. Wickersham, "and which were then delivered formally by Mr. Wickersham to us as a special deposit." He further testified (p. 1720) that he remembers George W. Wickersham coming into the bank on October 30th, 1891, to get the packages to take to the

The manner in which the $1,433,000 Nebraska & Western bonds came to be in the possession of the Union Loan & Trust Company prior to this delivery of the same to Mr. Wickersham as the representative of J. Kennedy Tod & Co., may be explained as follows: The 500 bonds held by the Manhattan Trust Company behind the loan of Garretson and Hedges to the underwriters' agreement were shipped to the Union Loan & Trust Company by instruction of Mr. Garretson on the 2nd day of December, 1890. ¶ On the 17th day of

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office of the clerk of the United States Court, when the packages were verified and found to contain 2436 bonds of the Nebraska & Western. Witness has no recollection of any stock. Witness assisted Mr. Wickersham in taking the bonds to the United States Court, where they were turned over to the clerk of the court about October 30th, 1891.

(p. 1548): NEW YORK, 19th October, 1891.

GEORGE W. WICKERSHAM, ESQ.,

Care First National Bank, Omaha, Nebraska.

Dear Sir: We confirm the telegram which we sent you today informing you that $1,000,000 of Nebraska & Western Pacific Short Line first mortgage 5% bonds have been forwarded to you. * *

Yours very truly,

J. KENNEDY TOD & CO.

W. S. Tod testified (p. 1371): "My belief and recollection is that they were delivered to us by that bank (Merchants' National Bank) because Mr. Garretson told them to deliver them to us. * * I remember that the St. Charles Car Company had some connection with $150,000 of bonds at that time, but as to the particulars of it, I cannot give you any information."

¶ John I. Waterbury testified that the 500 bonds of the Nebraska & Western, collateral to the $250,000 subscribed by Garretson and Hedges to the underwriters' agreement, remained

February, 1891, J. Kennedy Tod & Co. came into possession of $1,215,000 Nebraska & Western bonds, on account

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in the possession of the Manhattan Trust Company. He also testified to the receipt of the following letter from Wendell Goodwin:

(p 1561): October 22, 1890.

F. O. FRENCH, Esq., President Manhattan Trust Co.,
New York City.

Dear Sir: Having completed arrangements with A. S. Garretson of Sioux City, Iowa, for a loan of *65%* on $500,000 of the bonds of the Nebraska & Western Railway Company for six months at 8% interest, I hereby request that you will forward to the Union Loan & Trust Company of Sioux City, Iowa, a receipt setting forth that the Manhattan Trust Company holds for account of A. S. Garretson, subject to his order, as collateral to said loan, 500 bonds of the Nebraska & Western Railway Co. numbered from 2051 to 2550 inclusive, and I hereby certify that the said bonds are the property of the Wyoming-Pacific Improvement Co. and are subject to no other lien than the within mentioned. Yours very truly,

WENDELL GOODWIN, President.

To which letter the Manhattan Trust Company made answer as follows:

(p. 1425) NEW YORK, October 22, 1890.

THE UNION LOAN & TRUST COMPANY,
Sioux City, Iowa.

Gentlemen:

In accordance with a letter of Wendell Goodwin, Esq., of the 22nd October, as per copy herewith, we hereby certify that we hold for account of A. S. Garretson and subject to his order, as collateral to the loan therein described, 500 Nebraska & Western Railway Company bonds of $1,000 each, numbered 2051 to 2550 inclusive.

Respectfully,
F. O. FRENCH, President.

Mr. Waterbury testified: (p. 1426.) This *65%* loan on the

of A. S. Garretson,* and on July 31st the Manhattan Trust Company delivered to J. Kennedy Tod & Co. $150,000 Nebraska & Western bonds. Of the bonds so received by J. Kennedy Tod & Co., $150,000 were delivered to the St. Charles Car Co. on the 16th day of March, 1891, $82,000 to the Manhattan Trust Company July 29, and $200,000 were pledged to J. Kennedy Tod & Co. to secure a loan of $76,000, (p. 1369-70) and the remainder, $933,000, were transmitted to the Union Loan & Trust Company on the 7th day of August, 1891, by the direction of A. S. Garretson. † This transmittal of

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above bonds was an increase of $75,000 upon the $250,000 loan under the $1,000,000 loan agreement, or an increase of 15%. We held these 500 bonds until December 2nd, 1890, when they were shipped to the Union Loan & Trust Company by instructions of A. S. Garretson.

* See letter of J. Kennedy Tod & Co. to A. S. Garretson, dated February 17th, 1891. (rec. p. 654.)

† (p. 653.) 7th Aug. 1891.

UNION LOAN & TRUST COMPANY,
Sioux City, Iowa.

Dear Sirs: Under instructions from A. S. Garretson we are sending to you today by express $933,000 Nebraska & Western first mortgage 5% bonds. Kindly acknowledge their safe arrival and oblige,

Yours truly, J. KENNEDY TOD & Co."

(p. 654–5) 7th Aug. 1891.

A. S. GARRETSON, ESQ.,
Sioux City, Iowa.

Dear Sir: Referring to your favor of the 31st ulto., in which you instruct us to forward $835,000 Nebraska & Western first mortgage 5% bonds, we beg to advise you that we have this day forwarded to the Union Loan & Trust Company of Sioux City, Iowa, by American express, $933,000 of these bonds, valuing the package at $100,000. We will within a few days send

bonds to the Union Loan & Trust Company was not at the request of the Union Loan & Trust Company, nor under any claim of lien thereon or right thereto by the Union Loan & Trust Company, but was seemingly done

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you a note of the expenses incurred in forwarding the bonds, that you may remit to us. We do not know why you believed that we had but $835,000 of the bonds belonging to you. You will recall that on the 16th of February you delivered to us..... $1,215,000 bonds
And upon 31st July the Manhattan Trust Company delivered..... 150,000 bonds

$1,365,000

"Under your instructions the following deliveries were made:

March 16th, St. Charles Car Co..... $150,000
July 29th, Manhattan Trust Co..... 82,000
J. Kennedy Tod & Co.'s loan..... 200,000

$432,000

Balance as above..... $933,000

"The bonds would have been forwarded by us last week, but for the fact that it was not until yesterday that we succeeded in having them released by the Manhattan Trust Company and (Messrs.) Strong & Cadwalader.

"Yours very truly.

"J. KENNEDY TOD & CO.

(p. 661.) "SIOUX CITY, IOWA, Aug. 10, 1891.

"J. KENNEDY TOD & CO.,

"45 Wall Street, New York, N. Y.

"*Dear Sirs:* We are in receipt of your favor of August 7th stating that you had shipped to us by express $933,000 Nebraska & Western first mortgage 5% bonds. These bonds have arrived today. We have counted them and found them to be all right. Very truly yours,

"E. R. SMITH, Sec'y."

as a mere matter of safety deposit, a usual and customary thing to do, and which did not carry with it or give to J. Kennedy Tod & Co. any notice of any claim on the part of the Union Loan & Trust Company thereto. ‡

When the Nebraska & Western Railway was sold at the foreclosure sale, the same was bid in by George W. Wickersham and A. S. Garretson as trustees, and the road was reorganized under the name of the Sioux City, O'Neill & Western Railway Company, § and to which

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‡ J. Kennedy Tod testified: (p. 1457.)

"Q. Now, certain letters and correspondence had been sent to or returned from the Union Loan & Trust Company. What interest, if any, did you suppose the Union Loan & Trust Company had in the matter?

"A. Merely the safe deposit of the securities, the custodian of the securities for the owners.

"Q. Is it customary for you to receive the securities, for account of clients for whom you deal, from trust companies and similar institutions?

"A. It is.

"Q. Is it frequently done?

"A. It is almost universal.

"Q. Clients sent their securities to a trust company or some safe deposit institution?

"A. Unless they themselves are a large organization and have burglar-proof and fire-proof safes in their offices."

§ The order of the court confirming the sale to A. S. Garretson and George W. Wickersham as trustees is found in the record at pp. 1660 to 1666.

For deed of Special Master to A. S. Garretson and George W. Wickersham, trustees, under date October 30, 1891, see record, pp. 1643 to 1646.

For the deed of Garretson and Wickersham as trustees to

company Wickersham and Garretson as trustees conveyed the property in exchange for the new issue of its bonds and stock. Pending the issue of the engraved bonds of the Sioux City, O'Neill & Western, a temporary bond was issued; which was delivered to J. Kennedy Tod & Co., and which was afterwards exchanged for the engraved bonds. ‖ This transaction put all

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the Sioux City, O'Neill & Western Railway Company, see record, pp. 1648 to 1652.

For articles of incorporation of the Sioux City, O'Neill & Western Railway Company, see record, pp. 1635 to 1637.

For mortgage of the Sioux City, O'Neill & Western Railway Company to the Manhattan Trust Company, see record, pp. 1110 to 1121.

‖ See testimony of Garretson on this point, p. 770.

"Q. And you recollect whether in the first instance the bonds under the Sioux City, O'Neill & Western mortgage ran in the form of one printed bond?

"A. I think so, during the time that the permanent bonds were being gotten up.

"Q. And which as provided by the mortgage was to be exchanged for the engraved bonds when they were completed?

"A. Yes, sir.

"Q. Do you know as a matter of fact whether that temporary bond was delivered to J. Kennedy Tod & Co.?

"A. That is my memory.

"Q. And they afterwards exchanged that for the engraved bonds?

"A. Yes, sir."

Mr. French, of the Manhattan Trust Company, said (p. 1284) that the temporary bond, after certification, was delivered to Tod & Co. December 14th, 1891, and which was returned when the engraved bonds were exchanged therefor January 19th, 1892.

W. S. Tod (p. 1356) identifies the temporary bond of the

the bonds of the Sioux City, O'Neill & Western into the possession of J. Kennedy Tod & Co., in pledge to secure the $1,000,000 loan, with the full knowledge and consent of the Union Loan & Trust Company. ¶

Sioux City, O'Neill & Western which was delivered to his firm December 14th, 1891, and which was surrendered January 19th, 1892 (p. 1357). "When we surrendered it we got $2,340,000 of engraved bonds of the Sioux City, O'Neill & Western Railway Company." We held the bonds until the $1,000,000 loan was paid off, when they were delivered to J. Kennedy Tod & Co. as trustees under the trust agreement of December 31st, 1892, to secure the loan of $1,500,000.

(pp. 1123 and also 776) 21 December, 1891.

"JOHN I. WATERBURY, ESQ., V. PT.

"*Dear Sir:* I have had 500 bonds (No. 1 to 500 inc.) of Sioux City, O'N. & W. R. R. Co. sent you for signature as trustee and balance of issue will follow soon. When certificate is affixed, please deliver to Messrs. J. Kennedy Tod & Co. and take up and cancel a temporary bond issued awaiting engraving of the steel bonds. Send bill for services as trustee and oblige,

* *. "Yours truly,

"A. S. GARRETSON."

Garretson testified: (p. 776.)

"Q. Now, the bonds of the Sioux City, O'Neill & Western R. R. Co. were never here in Sioux City, were they?

"A. The Sioux City, O'Neill & Western? They were here to be executed, at any rate.

"Q. They were here to be executed by the officers of the R. R. Co.?

"A. Yes, sir; they were executed here.

"Q. And then they were sent to the Trust Co. for certificates, were they not?

"A. Yes, sir.

"Q. And for delivery to J. Kennedy Tod & Co.?

"A. Yes, sir."

¶ The mortgage of the Sioux City, O'Neill & Western

X.

A. S. Garretson Negotiated a Loan for $1,500,000 Through J. Kennedy Tod & Co. by the Sale of Pacific Short Line Bridge Company Notes to the Union Debenture Company, and Pledged $2,340,000 of Sioux City, O'Neill & Western Bonds and 14,200 Shares of Sioux City and Northern Stock as Security for said Loan by an Indenture of Trust with J. Kennedy Tod & Co. Under Date of December 31st, 1892.

It became apparent that the $1,000,000 loan made through J. Kennedy Tod & Co. under the contract of

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Railway Company to the Manhattan Trust Company is dated December 7th, 1891, and is found in the record at pp. 1110 to 1122.

Garretson testified: (p. 773) That Mr. Smith was the person who in all of these transactions represented the Union Loan & Trust Company, and that he knew about the $1,000,000 loan, and delivered to him (Garretson) or on his order the Nebraska & Western bonds that were in the Union Loan & Trust Company, and further:

"Q. And with regard to all, generally to all of your transactions with J. Kennedy Tod & Co., was Mr. Smith informed and kept informed by you?

"A. Yes, sir."

He further testified: (p. 774.)

"Q. But when you took the bonds of the Nebraska & Western R. R. Co. and pledged them to J. Kennedy Tod & Co. the Union Loan & Trust Co. didn't have them then?

"A. What bonds were those?

"Q. The Nebraska & Western.

"A. They had $500,000 of the bonds.

"Q. And those they surrendered to you?

"A. Yes, sir; those were surrendered the sale day.

October 1st, 1891, would have to be paid or otherwise provided for by the 31st of December, 1892, whereupon Mr. Garretson made application to J. Kennedy Tod & Co. for the negotiation of a loan for $1,500,000. * It was the original purpose in the negotiations to make this loan by giving the notes of the Sioux City, O'Neill & Western Railway Company for $1,500,000, to be

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"Q. And after that those bonds were pledged with Kennedy Tod & Co.?

"A. Yes, sir.

"Q. And of course they were no longer with the Union Loan & Trust Co?

"A. No, sir."

Mr. Smith, in speaking of the bonds of the Sioux City, O'Neill & Western, testified: (p. 832). The bonds were forwarded by the Union Loan & Trust Company, as I remember, to the Manhattan Trust Company for certification.

"Q. Did you ever have them afterward?

"A. No, sir."

* (p. 1011): (Telegram) "NEW YORK, Dec. 2, 1892. A. S. GARRETSON: We think it quite possible that we may be able to arrange loan for you upon the Western bonds and all the Northern stocks. You had better come here at your earliest convenience. Telegraph in answer.

J. KENNEDY TOD & CO.

(p. 1011): NEW YORK, December 9, 1892.

A. S. GARRETSON, ESQ.

Sioux City, Iowa.

Dear Sir: We confirm the statement which we have made you that we intend to negotiate for you a loan $1,500,000 for about 14 months upon the terms and conditions which we have mentioned to you and outlined to Messrs. Strong & Cadwalader, who are now at work drafting contracts.

Yours very truly,

J. KENNEDY TOD & CO.

secured by the bonds of that company and the stock of the Sioux City & Northern then in pledge with J. Kennedg Tod & Co. behind the $1,000,000 loan under the contract of October 1st, 1891. But J. Kennedy Tod & Co. were advised by their counsel, Strong & Cadwalader, that the Sioux City, O'Neill & Western Railway Company under the laws of Nebraska was not authorized to contract so large an indebtedness over and above its outstanding bonds, and thereupon the plan was conceived that Garretson should sell the said securities to the Pacific Short Line Bridge Company, a corporation of the state of Iowa, and receive back to himself the notes of the Pacific Short Line Bridge Company in the aggregate amount of $1,500,000, which said notes were to be secured by a pledge of the said securities, and that J. Kennedy Tod & Co. should negotiate a sale of the said notes upon the strength of the said securities. †

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† (p. 1124.) (Telegram.) "NEW YORK, Dec. 2, 1892.

"*A. S. Garretson:* On examination find railroad company cannot lawfully make notes, present indebtedness being almost to limit. Tod suggests Bridge Co. do it, and we can prepare papers on that theory. Who are officers of the Bridge Co.? Please arrange have directors of that company meet to pass resolutions we will send you, and you should have one Saturday.

"STRONG & CADWALADER."

J. Kennedy Tod testified: (p. 1316.)

"Q. Will you state how that loan came to be made to the Pacific Short Line Bridge Company?

"A. The earlier negotiations contemplated a loan to the railway company (the Sioux City, O'Neill & Western) but our counsel advised us 'that under the statutes of Nebraska it was doubtful if the railway company could make that loan in view of its existing other indebtedness, and I then talked the matter

On the 26th day of December, 1892, the Pacific Short Line Bridge Company, at a meeting of its Board of Directors, passed a series of resolutions by which it agreed to purchase the bonds of the Sioux City, O'Neill

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over and suggested that inasmuch as the Bridge Company was to benefit, largely from this loan and the whole situation was to benefit, inasmuch as the parties interested in the railway company were also the owners of the bridge, they might get the Bridge Company to borrow the money. * * *

"Q. What knowledge had you at that time of the financial of constructing this bridge?

"A. None whatever except when it was engaged in this work of constructing this bridge.

(p. 1317.) "Q. And yet you were willing to make the loan to the Bridge Company?

"A. Yes, the collateral was the same, whoever made the loan. * * *

"Q. What did you consider to be the value of the collateral at that time?

"A. I considered it ample security for the loan.

"Q. And therefore it did not make much difference who was the formal maker of the loan?

"A. No, sir.

"Q. Is it true that Mr. Garretson suggested to you that the Bridge Company should make the loan?

"A. It is not to the best of my recollection, Mr. Garretson was in the west and the suggeston was telegraphed to him I believe by you at my suggestion.

"Q. Is it true that Mr. Garretson informed you that the Bridge Company had judgments against it and was unable to pay them?

"A. That is wholly, completely, absolutely and entirely false.

"Q. And is it true that he told you that its credit both at home and abroad was ruined?

"A. That is false.

& Western Railway Company, and 10,200 shares of the capital stock of the Sioux City & Northern, and to give therefor its promissory notes in the sum of $1,500,000 to the order of A. S. Garretson, bearing date December 30, 1892, and to pledge the said bonds and stock to the said A. S. Garretson as security for the said notes. ‡ Pursuant to said resolution, and on the 31st day of December, 1892, a contract was entered into between Garretson, Hedges, Hornick and Haakinson and the Pacific Short Line Bridge Company by which the Bridge Company purchased the said securities and agreed to give in payment therefor its promissory notes to the amount of $1,500,000, payable to the order of A. S. Garretson, bearing date December 30, 1892, and which notes were to be forwarded to J. Kennedy Tod &

"Q. And is it true that he stated that the corporation, the Bridge Company, could be used for this purpose from the fact that it was necessary to organize a new Bridge Company, or one had already been organized from the fact that the old corporation was insolvent and had judgments against it and it could not be used as a proper corporation for the construction of the bridge?

"A. That is false, and I think that the records will show that Mr. Garretson was in the west; that the suggeston for the first time that the Bridge Company should be the party to make the loan was made by telegram; it is impossible that there could have been any conversation of such a character.

"Q. Did you have any knowledge at that time that it was proposed to organize a new corporation to build the bridge?

"A. No.

"Q. Had you any knowledge at that time that the Pacific Short Line Bridge Company was insolvent?

"A. I had not."

‡ These resolutions are set down in the record at pp. 1498-9.

Co., who should deliver the same to the said A. S. Garretson or on his order upon the receipt of the said securities, or as a deposit and pledge of the same to J. Kennedy Tod & Co. as trustees to secure the payment of said notes. §

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§ This contract is found in the record at pp. 1733-5, and its material recitals are:

"This agreement made this 31st day of December, A. D., 1892, by and between A. S. Garretson, D. T. Hedges, John Hornick and Edward Haakinson, parties of the first part, and the Pacific Short Line Bridge Company, party of the second part, witnesseth:

That whereas the parties of the first part are the owners of $2,340,000 Sioux City O'Neill & Western bonds and the stock of the Sioux City & Northern, excepting 4,200 shares, and the party of the second part is desirous of purchasing the same.

"Now, therefore, the parties of the first part do hereby sell, assign, transfer and set over unto the party of the second part the said $2,340,000 Sioux City, O'Neill & Western bonds, and the stock of the Sioux City & Northern, excepting 4,200 shares, in consideration of the sum of $1,500,000 which the party of the second part agrees to pay, in manner following: $500,000 on February 1st, 1894, $500,000 on March 1st, 1894, and $500,000 on April 1st, 1894." And to secure the payment of said amounts, the party of the second part will deliver unto the said A. S. Garretson "its promissory notes to the order of A. S. Garretson bearing date December 30th, 1892, to the aggregate amount of $1,500,000; and whereas the said A. S. Garretson desires to sell and transfer said notes and to furnish additional security therefor, each of said notes shall provide that in case of default in the payment of any installment of interest upon any notes of said issue * * and such default shall continue for thirty days, the principal of all the said notes of said issue may forthwith become due and payable at the option of the said J. Kennedy Tod & Co., on behalf of the holders of said notes,

J. Kennedy Tod & Co. negotiated a sale of the said notes through the Union Debenture Company, a corporation of the State of New Jersey, which is evidenced by a contract under date of December 30th, 1892, between the said Garretson and the Union Debenture Company, and which contract recites that the notes are to be secured by the said bonds and stock by an indenture of trust with J. Kennedy Tod & Co. as trustees. ‖

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whereupon the same shall forthwith be declared due and payable" upon the written request of the holders of a majority of said notes.

"It is further agreed that the said $2,340,000 in the bonds of the Sioux City, O'Neill & Western Railway Company, and the said entire issue of stock of the Sioux City & Northern Railroad Company, excepting 4,200 shares, be and are hereby pledged unto the said A. S. Garretson as security for the payment of said notes." It is also provided that the said notes shall be forwarded to J. Kennedy Tod & Co., who shall deliver the same to A. S. Garretson upon the receipt of the $2,340,000 of Sioux City, O'Neill & Western bonds and the stock of the Sioux City & Northern, or a deposit and pledge of the same to the said J. Kennedy Tod & Co. as trustees to secure the equal and *pro rata* payment of the said notes, and the said Garretson is authorized to pledge the said stock and bonds as security for the paypent of said notes, and to which agreement the parties of the first part "do hereby assent to and ratify." Said agreement is signed by A. S. Garretson, D. T. Hedges, John Hornick, Ed. Haakinson and the Pacific Short Line Bridge Company, by W. H. Goodwin, Jr., Vice President.

‖ This contract of sale is found in the record at pp. 667 to 670. This contract provides (p. 668) that Garretson shall execute an indenture of trust "transferring and conveying unto J. Kennedy Tod & Co. as trustees as security for the equal and pro rata payment of the said promissory notes, 2,340 of the first mortgage 5% gold bonds of the Sioux City, O'Neill &

On the 31st day of December, 1892, A. S. Garretson entered into an indenture of trust with J. Kennedy Tod & Co. by which he pledged the said bonds and the said stock to J. Kennedy Tod & Co. as trustees for the equal and pro rata benefit and security of all the holders of the said notes, and which indenture of trust provided that if default should be made in the payment of the principal or interest of any of said notes, and should continue for thirty days, the trustee has authority, upon the request of the holders of one-half in amount of the notes, to declare the principal and interest upon the notes to be due, and that the said trustees, upon the written request of the holders of a majority in amount of said notes should proceed to sell at public auction in the city of New York the said bonds and stock. ¶ The notes for the loan of $1,500,000 were

Western Railway Company, and 14,200 shares of the capital stock of the Sioux City & Northern Railroad Company." The second paragraph of the contract provides: (p. 668.) "The Debenture Company agrees to procure the said notes so secured to be sold at par and accrued interest within one month from the date hereof, or to purchase and take the same at par and accrued interest, and to advance thereon at once to the party of the first part the sum of one million one hundred thousand ($1,100,000) dollars and such additional amount, not exceeding four hundred thousand dollars ($400,000) as the party of the first part may require."

¶ For indenture of Trust, see rec. pp. 632 to 642. This indenture recites that Garretson is the owner of Pacific Short Line Bridge Company notes to the amount of $1,500,000, of the manner and form therein set down. (p. 633.) "Now therefore this indenture witnesseth (p. 635) * * The party of the first part has granted, sold, conveyed, transferred, assigned and delivered to the parties of the second part * * all and singular the following stocks and bonds, namely, two

prepared in New York and transmitted to Mr. Garretson at Sioux City for execution on the 19th day of Jan-

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thousand, three hundred and forty (2,340) bonds of the Sioux City, O'Neill & Western Railway Company, for the sum of one thousand dollars ($1,000) each, dated the 7th day of December, 1891 * * secured by mortgage of even date therewith executed by said company to the Manhattan Trust Company of New York, as trustee; also fourteen thousand two hundred (14,200) shares of the capital stock of the Sioux City & Northern Railroad Company * * for the equal and pro rata benefit and security of all the holders from time to time of the said notes."

The second proviso of the indenture is for the foreclosure of the mortgage in case of default in the payment of interest on the bonds. (p. 636).

The fifth paragraph provides (p. 638): "In case default shall be made in the payment of any principal or interest on any of the notes * * and said default shall continue for thirty days then in that case the said trustees may, and upon request by the holders of one-half in amount of the notes secured hereby * * * shall declare the principal and interest of all such notes * * * immediately due and payable * * * and the said trustees may, and upon the written request of the holders of a majority in amount of the said notes secured hereby and then outstanding, shall proceed to sell at public auction in the city of New York the said bonds and stock then constituting the trust for the security of said notes."

The contract further provides (p. 640) that if a purchasing trustee shall buy the bonds and stocks, "the right and title thereof shall vest in the trustee so appointed, in trust for all of said note-holders, in proportion to the amounts remaining due on account of their respective notes."

uary, 1893. * These notes were returned, and the transaction was closed on the 30th of January, 1893, and the Union Debenture Company on that date turned over to J. Kennedy Tod & Co. on account of A. S. Garretson, $1,507,500, being the principal of the notes with interest up to that date, and thereupon J. Kennedy Tod & Co. on that date paid off the $1,000,000 loan, with accrued interest, $1,004,833.33. †

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* (p. 1013.) "NEW YORK, 19th January, 1893.

"A. S. GARRETSON, ESQ.,

"Sioux City, Iowa.

"*Dear Sir:* We are sending you today by express 300 notes, of $5,000 each, of the Pacific Short Line Bridge Co., in order that you may endorse them in blank so that they will become negotiable. * * *

"J. KENNEDY TOD & CO."

† (p. 1014): 31st January, 1893.

A. S. GARRETSON, ESQ.,

Sioux City, Iowa.

Dear Sir: * * * * * *

Acting upon your behalf we paid off your notes for $1,000,000 at par and interest, debiting your account with $1,004,833.33, as per memo. enclosed herewith.

Having paid off this loan, we release the $2,340,000 Sioux City, O'Neill & Western first mortgage 5% bonds, the 18,000 shares of the Sioux City & Western stock, and the 7,200 shares of the Sioux City & Northern Railway Co. stock and received them on our books for your account. We had received from the Pacific Short Line Bridge Co. its notes for $1,500,000, as called for in the contract between you and others, * * of 31 December, 1892. In accordance with the authority given us by you we took from your account $2,340,000 Sioux City, O'Neill & Western first mortgage 5% bonds, 10,200 shares of Sioux City & Northern stock and also 4,000 shares of the Sioux City & Northern Railway Co. stock, and delivered them to ourselves

The record contains a copy of one of the Bridge Company notes (p. 1736-7), in which is the provision that the principal of said notes may be declared due upon default being made in the payment of the interest or principal, and has an addenda setting forth that the notes are secured by an indenture of trust dated December 31st, 1892, between the said Bridge Company

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as trustees under the indenture of trust made by you under date of 31st of December, 1892.

We thereupon certified the $1,500,000 Pacific Short Line Bridge Co. notes and received them from the company for your account. The notes having been drawn to your order and endorsed by you, we delivered them on your behalf to the Union Debenture Company and received payment at par and interest, crediting your account with $1,507,500, as per the memo. enclosed herewith. We have debited your account with $52,500, which amount we paid to the Union Debenture Company for its services in this connection. * * *

"J. KENNEDY TOD & CO."

(p. 1015.) "NEW YORK, Jan. 30, 1893.

"Sold for account A. S. Garretson, Esq., by J. Kennedy Tod & Co., 45 Wall Street, $1,500,000 notes Pacific Short Line Bridge Company at 100%..... $1,500,000
Int. fr. Dec. 30th, 1 mo. at 6%..... 7,500

$1,507,500

(p. 1015.) "NEW YORK, Jan. 30th, 1893.

"Paid for account of A. S. Garretson, Esq., by J. Kennedy Tod & Co. 45 Wall Street, New York.
$1,000,000 notes of A. S. Garretson at 100%..... $1,000,000
Int. from Jan. 1st, 29 days, at 6%..... 4,833.33

$1,004,833.33

and J. Kennedy Tod & Co. as trustees, and the deposit thereunder of certain bonds and stock as collateral securities. ‡

The Union Debenture Company is a corporation of the State of New Jersey with a capital stock of $300,000, and with assets of over $800,000, and has issued and outstanding $500,000 of twenty year debenture bonds which have been sold in England, Scotland and Holland. § J. Kennedy Tod & Co. own one-third of

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‡(p. 1044): "The within note, together with all other notes of the Pacific Short Line Bridge Co. herein referred to, amounting in the aggregate to $1,500,000, is further secured by a certain indenture of trust dated the 31st day of December, 1892, between the undersigned and J. Kennedy Tod & Co. as trustees, and the deposit thereunder of certain bonds and stock as collateral securities to which indenture reference is hereby had with the same effect as if it were here set forth at length."

§ J. Kennedy Tod testified: (p. 1316). "It is a corporation which I may say I think was organized at the instance of my firm and a few of our more intimate friends and clients for the purpose of doing business as a corporation which was somewhat out of the line of a private firm.

"Q. How long has it been in existence?

"A. Many years.

"Q. What is its capital?

"A. $300,000 cash. It also issued a half million of dollars and sold at par a half million dollars of its 5% twenty debentures; has assets of over $800,000; it is a substantial and active financial corporation."

He further testified: (p. 1323). That the debenture bonds were sold mainly in England, Scotland and Holland, and that the company has paid regular dividends for several years.

its capital stock. ‖ J. Kennedy Tod & Co. very largely controlled the business of the Union Debenture Company, and its stockholders were valued friends and clients of J. Kennedy Tod & Co., and this loan of $1,500,000 was negotiated through the Union Debenture Company at the instance of J. Kennedy Tod & Co. ¶

‖ See testimony of William S. Tod, p. 417.

W. S. Tod further testified: (p. 421.)

"Q. How much stock is there in the Debenture Company?

"A. The stock of the Company at present is $300,000, and I believe it was the same at that time.

"Q. And how much of that is held by the members of J. Kennedy Tod & Co.?

"A. A little over one-third."

J. Kennedy Tod testified: (p. 501.)

"Q. How much stock of the Union Debenture Loan Company is held outside of the firm and its members?

"A. About two-thirds, I should say, was held outside of the firm."

¶ J. Kennedy Tod testified: (p. 1324). When the negotiations for the loan of $1,500,000 began, it was suggested the loan be made to the Union Debenture Company. (p. 1325.) "There was no negotiations except on behalf of the Union Debenture Company. * * * We made no negotiations except in behalf of the Union Debenture Company. * * * He (Garretson) knew or ought to have known from the beginning that it was the Union Debenture Company who were willing to make this loan. * * * The Debenture Company was referred to as the party making the loan by my partners and myself, "in our negotiations with Mr. Garretson." * * *

Again, on p. 1326:

"Q. When you say that the Union Debenture Company as a corporation * * * who was the controlling

J. Kennedy Tod & Co. were the brokers through whom the Union Debenture Company transacted its business, and J. Kennedy Tod & Co. sold the notes as such brokers to various persons who became *bona fide* owners and holders thereof for value before maturity, without notice of any claims of the Union Loan & Trust Company. *

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mind of the Union Debenture Company, who sought the business, who represented it?

"A. Modesty forbids me to say it was myself, but I might say it was my firm—it is fair to say my firm were perhaps the controlling minds.

"Q. Why did the firm in its capacity as the representatives of the Union Debenture Company desire to have the loan made through it instead of themselves as a firm?

"A. For the same reason that actuated my firm in giving the Union Debenture Company all the business it ever did. We are stockholders in it, and our most intimate, valued friends and clients are stockholders, and we are as anxious they should prosper as we ourselves should prosper."

*J. Kennedy Tod testified (p. 619) that his firm did not take any part of the $1,500,000 loan.

W. S. Tod testified: (p. 1366.)

"Q. Is any of the Short Line Bridge loan held abroad?

"A. Yes, a large portion of it is owned by parties abroad. * * * I would say there was between $500,000 and $600,000 of it owned abroad.

"Q. Were the notes held abroad sold through your firm by the Debenture Company?

"A. Yes, we bought them for the parties in Europe."

Again (p. 1393) W. S. Tod testified that after refreshing his recollection he could testify that "118 of the promissory notes of $5,000 each of the Pacific Short Line Bridge Company were sold to foreign correspondents."

The proceeds of the $1,500,000 loan remaining after the discharge of the obligations to J. Kennedy Tod & Co. were applied through the Union Loan & Trust Company to the payment of the Bridge Company obligations, and to the credit of the account of John Hornick, trustee,* and the Union Loan & Trust Company never made any demand for the remainder of the proceeds of said loan, nor in any manner made any claim thereto until just prior to the beginning of this suit, and then only made claim to the securities. †

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* Garretson testified (p. 778) that $500,000 out of the $1,500,000 loan "was applied at the Union Loan & Trust Company and applied to the pay-rolls or rather the estimates of the contractors of the bridge.

"Q. So that substantially all of that went towards the construction of the bridge, did it?

"A. No, sir; I shouldn't say above $200,000 was applied on the bridge estimates.

"Q. What was done with the balance?

"A. The balance of it went in to the Trust Co. and I presume to the credit of Hornick, trustee.

"Q. That was your directions, was it?

"A. Yes, sir.

"Q. And upon paper endorsed by the Union Loan & Trust Co.?

"A. I presume so.

"Q. That was your instructions?

"A. That is my understanding. I do not know that there was any instructions following the transaction.

"Q. Was that what you paid it to the Union Loan & Trust Company for?

"A. Yes, sir; that is my memory of it."

†W. S. Tod testified (p. 1392) that the first time he had any notice or intimation that the Union Loan & Trust Company had any interest in or claimed any interest in the bonds or stock

All the members of the syndicate were parties to the agreement by which the Sioux City, O'Neill & Western bonds and the stock of the Sioux City & Northern, in controversy, were sold to the Pacific Short Line Bridge Company (p. 1733), and knew of the use which Garreston proposed to make of the Bridge Company notes and the securities. It appears that the members of the syndicate had a private conference before the execution of that agreement, and agreed to the execution of the contract and the loan, and acquiesced in and ratified the transaction,* and never made

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of the Nebraska & Western or of the Sioux City O'Neill & Western was in 1893, when the suggestion came from Mr. J. C. Coombs.

"Q. Was that the first time you heard made a claim as to these securities?

"A. Yes."

This was after the loan of $1,500,000, and after default had been made in the payment of interest.

*John Hornick testified: (p. 1687). "Garretson had already removed the collateral from the Union Loan & Trust Company to New York before we knew it. He had already placed it with Kennedy Tod before we signed the contract, and as it was done, the only thing left for us to do was to sign the contract. He assured us that everything would go through all right, and he would make everything right I had my doubts about that; but we had a meeting aside from Garretson to see what was best to do, and when we found out what he had done, and we concluded the only thing left for us to do was to sign the contract.

"Q. You knew perfectly well when Garretson received the $1,000,000 loan the year before, did you not? You knew of his getting the $1,000,000 in the fall of 1891?

"A. Yes, sir."

any complaint to or gave any information to J. Kennedy Tod & Co. that Garretson was wrongfully pledging the collateral.

And again (p. 1688):

"Q. When the $1,500,000 loan was finally consummated, you recognized the fact that you were a party to the transaction whereby the securities named in the contract I have referred to went as collateral to the $1,500,000 loan?

"A. Yes."

On p. 904 he testified:

"Q. And you acquiesced and ratified what had been done?

"A. I did under protest. * *

"Q. Did you know of the $1,500,000 loan?

"A. Yes.

"Q. And you signed the papers for that loan?

"A. I did, yes, sir."

D. T. Hedges testified: (p. 1712.)

"Q. Do you know anything about a loan of $1,000,000 made to Garretson by J. Kennedy Tod & Co.?

"A. Yes, sir; I know about that.

"Q. When did you first know about that loan?

"A. Mr. Garretson reported to us at Sioux City what he had done in that matter. That he had gotten a loan, I think in 1891.

(p. 1713.) "Q. That he had gotten a $1,000,000 loan from J. Kennedy Tod & Co.?

"A. Yes, sir.

"Q. Did you see the contract?

"A. I think so; that is my recollection. * * *

"Q. Did you know about a loan of $1,500,000 negotiated through J. Kennedy Tod & Co. in December, 1892, or January, 1893?

"A. Yes, sir.

"Q. Do you know what security that was obtained upon?

"A. Same as the first.

"Q. You saw the contract at that time?

"A. Yes, sir."

XI.

Default Having been made in Payment of Interest on the $1,500,000 Loan on the first day of July, 1893, on Request of a Majority of the Note Holders J. Kennedy Tod & Co. Declared the Principal of the Notes to be due, and on the 26th day of September, 1893, sold the Securities, and the same were Purchased by J. Kennedy Tod & Co. as Purchasing Trustees.

The notes of the Pacific Short Line Bridge Company provided that they should bear interest at the rate of 6% per annum from date until payment, such interest to be paid on the first day of July, 1893, and the first day of January, 1894. *

The indenture of trust with J. Kennedy Tod & Co. also provided in the fifth paragraph that in case default should be made in the payment of interest, and said default should continue for thirty days, then in that case the trustees may and upon request by the holders of one-half in amount of the said notes should declare the principal and interest of all said notes to be immediately due and payable, and upon the written request of the holders of the majority in amount of the said notes, should proceed to sell at public auction in the city of New York the said bonds and stock, constituting the security for the said notes. † On the 24th day of August, 1893, the holders of a majority in amount of the said notes presented to J. Kennedy Tod & Co. their written request setting forth the default in

* For this condition of note, see rec. p. 1737.

† For this provision of the indenture of trust, see rec., p. 638.

the payment of the interest maturing July 1st, 1893, and that said default had continued for thirty days, and demanding of the trustees that they exercise the option provided in said notes and trust agreement by declaring the principal of all of the notes to be due and payable, and to proceed forwith to sell the bonds and stock, as provided in the said trust agreement. ‡

On the 25th day of August, 1893, J. Kennedy Tod & Co. as trustees notified the Pacific Short Line Bridge Company and A. S. Garretson that default had been made in the payment of the interest due and payable on the first day of July, 1893, and that said default had continued for thirty days, and that upon the request of the note holders they declared the principal and interest of all said notes to be immediately due and payable, and demanded payment. § J. Kennedy

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‡ For a copy of this request, see rec., p. 1513.

§ For a copy of this written notice and demand, see rec., pp. 1513-14.

J. Kennedy Tod testified: (p. 1320.)

"Q. The interest on the $1,500,000 indebtedness, was that paid on July 1st, 1893?

"A. It was not.

"Q. And was any request made to you by the note holders to take any action with regard to that loan?

"A. Yes, sir; the majority of them."

The witness then states that a written request by the holders of a majority of the notes was delivered to J. Kennedy Tod & Co. as trustees under the Union Debenture loan, on the 24th day of August, 1893, and which request is found in the record at p. 1513, and which directs J. Kennedy Tod & Co. to declare the principal of the notes to be due and to proceed forthwith to sell the bonds and stock constituting the security for said notes. On the 25th day of August, 1893, J. Kennedy Tod & Co. as

Tod & Co. caused notice to be duly published that they would sell the said securities at public auction at the real estate exchange and auction rooms, No. 59 and 61 Liberty street, in the City of New York, by Harnett & Co., auctioneers, on Tuesday, the 19th day of September, 1893. ‖ This sale was postponed to the 26th day of September, 1893, and due notice and publication of said postponement was made ¶

On the 26th day of September, 1893, the securities were sold at the time and place above indicated, at public auction by Harnett & Co., auctioneers, and were purchased by J. Kennedy Tod & Co., purchasing trustees. *The bonds and stock were then redelivered to J.

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trustees, pursuant to said request, declared the principal of said notes, $1,500,000, to be due, and gave notice to the Bridge Company demanding payment. (pp. 1513-14.)

(p. 1327): None of the parties who signed the request to declare the principal of the $1,500,000 loan to be due were interested in the Union Debenture Company.

‖ For a copy of said newspaper publication and proof thereof, see rec., pp. 1531-2, 1533-4 and 1537.

¶ For notice and proof of publication of the postponement of sale to September 26th, 1893, see rec. pp. 1532-3, 1534-5, 1535-6 and 1537-8 These notices of sale and notices of postponement were each published in the Evening Post and the New York Times, in the City of New York, and in the Sioux City Journal, at Sioux City, Iowa, in compliance with a provision of the indenture of trust, p. 639.

* Touching the sale of the securities pledged to secure the $1,500,000, J. Kennedy Tod testified (p. 1335) that his firm caused the sale of the securities to be made, and that they were purchased by J. Kennedy Tod & Co. as purchasing trustee.

Euclid C. Martin, a clerk of Richard V. Harnett & Co., testified (p. 1395) that he attended the auction sale September

Kennedy Tod & Co., as purchasing trustees who continued to hold the same for the benefit of the holders of the notes secured thereby. † J. Kennedy Tod & Co.

26th, 1893, and produced the record of that sale, which contained the following: (p, 1396.)

"Stocks and Bonds Sale, Tuesday, Sept. 26, '93.

Stocks & Bonds.	Bids.	Price.	Name.
For account whom it may concern.			
10,600 shares Sioux City & No. R. R. Co., $100 each. Hyp.	$1,000,000.	$1,000,000.	J. Kennedy Tod & Co., Purchasing Trustees.
2,340,000 Sioux City, O'Neill and Western R'way Co., 1st mtg. 5 per cent. Gold Bonds, April, 1893, Coupons attached (hyp.)"			

William E. McKenna testifled (p. 1398–9) that he was the bookkeeper of Harnett & Co. and that he received the stock and bonds from J. Kennedy Tod & Co. and re-delivered the bonds and stock to J. Kennedy Tod & Co. as the purchasers and received from J. Kennedy Tod & Co. the two following documents:

† (p. 1555.) "26th September, 1893.

"MESSRS. RICHARD V. HARNETT & CO., Auctioneers,

"New York.

"*Dear Sirs:* We have purchased of you the 10,600 shares Sioux City & Northern R. R. Co. stock and $2,340,000 first mortgage bonds of the Sioux City, O'Neill & Western Railway Co. sold by you at auction today, as purchasing trustees, under the provisions of the identure of trust pursuant to which the same were sold, for the benefit of the holders of the notes secured thereby, and by their request, and we shall make payment therefor by crediting upon said notes the purchase price of the

thereupon issued certificates to the note holders, reciting that they (J. Kennedy Tod & Co.) had purchased the said securities and held the same for the equal benefit of the holders of the notes, and which certificate also recites that each of the note holders who has deposited a note for $5,000 is entitled to the one equal three-hundredth part interest in the said securities. ‡

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securities, viz: $1,000,000, after deducting the expenses of sale, receipt of which sum we therefore acknowledge.

Yours very truly,

"J. KENNEDY TOD & CO.,

"Trustees."

(p. 1556.) "NEW YORK, 26 September, 1893.

"Received from Messrs. Richard V. Harnett & Co., auctioneers, New York, the following securities sold by them at auction today and purchased by us:

10,600 shares Sioux City & Northern R. R. Co. stock, and

$2,340,000 first mortgage bonds of the Sioux City, O'Neill & Western Railway Company.

"J. KENNEDY TOD & CO.,

"Purchasing Trustees."

(p. 1548): NEW YORK, September 26th, 1893.

Sold at auction this day to Messrs. J. Kennedy Tod & Co., purchasing trustees:

10,600 shares Sioux City & Northern R. R. Co., $100 each.

$2,340,000 Sioux City, O'Neill & Western R. R. Co. 1st mtg. 5% gold bonds, Apl. 93 coupons attached, $1,000,000.

* * Received payment in full.

RICHARD V. HARNETT & CO.,

Per McKenna.

‡ For a copy of the form of certificate, see rec. pp. 1539-40.

W. S. Tod testified (p. 1358) that after this sale, the notes for the $1,500,000 were turned in to J. Kennedy Tod & Co. and certificates were issued to the note holders by J. Kennedy Tod & Co. as purchasing trustees.

XII.

A Committee of the Creditors of the Union Loan and Trust Company on the 25th of September, 1893, made a Proposition to J. Kennedy Tod & Co. to pay the Defaulted Interest on the $1,500,000 Loan, but only on Condition that J. Kennedy Tod & Co., Should Arrange to Give the Committee Control in the Directory of the Sioux City and Northern R. R. Co. which Condition J. Kennedy Tod & Co. Declined as one Beyond their Will and Power to Grant.

In July or August, 1893, Mr. J. C. Coombs, the solicitor of the intervenor, sought an interview with J. Kennedy Tod & Co. touching the securities held by them to secure the $1,500,000 loan, but without any well defined aim or purpose, so far as the record discloses. But little was indicated by him at that time further than the suggestion that he represented the creditors of the Union Loan & Trust Company, and that they might desire to pay the defaulted interest upon the loan. Mr. Coombs was advised that the note holders had made a formal demand upon J. Kennedy Tod & Co. as trustees to declare the principal of the notes to be due, and that they proceed to sell the securities under the provisions of the indenture of trust. * Before the coming on of

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* (pp. 679–80.)

"23rd August, 1893.

"JOHN C. COOMBS, ESQ.,

"150 Devonshire Street, Boston.

"*Dear Sir:* * * * We are informed that tomorrow the holders of a majority of the notes will make formal request upon us to declare the principal of the notes due, and proceed forthwith to sell the bonds and stock constituting the security for the notes. The process we think involves advertisement for two weeks and thereafter sale by auction. We men-

the date when the sale was expected to take place, to-wit, the 19th of September, 1893, Mr. Coombs, in behalf of the committee of creditors, requested a postponement of the sale to enable the committee to see what might be done toward payment of the defaulted interest. It was in pursuance of this request that the sale was postponed from the 19th day of September to the 26th day of September, as set forth in part XI of this brief. †

As early as the 25th of August, the said committee had decided so make it a condition precedent to the payment of the interest that Garretson and his associates should retire from the board of directors of the respective properties into which it was claimed money had gone which had been furnished through the Union Loan & Trust Company. ‡

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tion this fact to you, but we do not see why it should change your purpose.

Yours very truly,

"J. KENNEDY TOD & CO."

† J. Kennedy Tod testified: (p. 508.)

"Q. I was going to ask you, and do ask you, whether any question was made by you of the actual tender of the interest at that time?

"A. The object of your call was to pay that interest. You never tendered it. * * You telegraphed me in the first place, the last time I saw you, prior to that; you left having obtained from us an extension of time; you left for the west to raise money for the purpose of curing the default; you telegraphed me from the west, and the next time you appeared with two other gentlemen."

‡ (p. 681): "MINNEAPOLIS, MINN, Aug. 25th, 1893.

"J. KENNEDY TOD & CO.,

"Wall Street, N. Y.

"*Gentlemen:* In the Sioux City matter the central com-

The committee made a report to the creditors' meeting held in Chicago on the first day of September, 1893, which contained an extended and detailed statement of the history of the transactions of the Union Loan & Trust Company, and of the railroad syndicate, and of the various securities, but which report does not assert title to the securities in question superior to that of J. Kennedy Tod & Co., but which report indicated that it was the policy of the committee, if possible, to acquire the control of the various corporations with which the railroad syndicate had been connected, and made that a condition precedent to the payment of the defaulted interest upon the loan. §

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mittee of creditors was in session in Chicago three days. * * Mr. Garretson and Mr. Hubbard were present and I deem it pertinent to advise you that the committee imposed it as a condition precedent to the payment of the interest by them that Mr. Garreston and his associates should retire from the boards and allow us to fill their places. I do not see how this could be other than satisfactory to you. After taking a night to consider the matter, Mr. Garreston assented. If the creditors undertake this business, we shall, of course, want to meet you and have a more friendly understanding than we can lay claim to at present. I will report the result of Wednesday's action to you. Res'y

"JOHN C. COOMBS."

§ (p. 1068): "Our immediate call upon you is for 2½% of the amount of your railroad syndicate paper to enable us to take off the default in the payment of the interest on the Kennedy Tod & Co. loan. In consideration of such payment Mr. Garretson and associates have agreed, as we imposed it as a condition, to place the creditors in the majority or control of the Board of directors of the railroad, terminal and bridge properties."

On the 25th day of September, 1893, being the day preceding the sale, Mr. Coombs, Mr. Plummer and Mr. King, in behalf of the creditors of the Union Loan & Trust Company, appeared at the banking house of J. Kennedy Tod & Co. and represented that they were prepared to pay the interest in default, but coupled the statement with various conditions and demands with which J. Kennedy Tod & Co. did not wish to comply, and with which they could not have complied had they been so inclined. The chief of these demands was that the committee should be given the control of the Board of Directors of the Sioux City & Northern Railroad Company. ‖

‖ J. Kennedy Tod testified: (p. 507.)

"Q. What was the difference between us on which we failed to come to an agreement at that interview as you recall it?

"A. You didn't tender payment of the money—money that was due to the holders of those notes of the million and a half loan.

"Q. Well, aside from that?

"A. I presume the object of your visit was that we had taken action in foreclosing under those notes, to give you an opportunity to pay up the interest which was in default, and you did not tender the payment of that interest, besides making ridiculous claims which I was not in a position to grant, even if I had the wish to grant, which I didn't have.

"Q. Well, waiving for a moment the question as to the payment of interest—

"A. I didn't waive it.

"Q. I say I waive it now—what was the ridiculous demand which you wouldn't comply with?

"A. You demanded control in the Board of Directors of the Sioux City & Northern Railway Company."

It is disclosed in the record that there existed a traffic arrangement between the Sioux City & Northern R. R. Co. and the Great Northern R. R. Co., and James J. Hill, the president of the Great Northern, was the holder of $500,000 of the loan for $1,500,000 se-

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J. Kennedy Tod testified: (p. 508.)

"Q. Now, Mr. Tod, I ask you, of course expecting that you will always be frank, but especially in this, didn't we reach a clear and definite point of difference entirely upon that question of control?

"A. I told you that I had neither the power nor the disposition to grant the request made."

J. Kennedy Tod testified: (p. 509.)

"Q. Then I further said that the $1,500,000 in the spring was due in three payment, $500,000 a month, and I said that it was bad financiering and that it was too much money to pay so quick, and that I would like to have that extended for a longer period, and you said that you couldn't promise any thing of that kind?

"A. That is so.

"Q. And I said I did't insist on that. Isn't that true?

"A. I don't see what you could insist on, knowing you had no rights in the matter. You were asking privileges. You were not enforcing rights.

"Q. That was all. But didn't it all narrow down to the question between us after we had discussed it—all narrow down to the question of the control of the Sioux City & Northern?

"A. The sole question before us at that time was the payment of that interest. That was about the only question that wasn't touched upon in the interview.

"Q. The payment of the interest is about the only question that wasn't touched upon?

"A. Yes. * *

"Q. But wasn't the condition upon which I said I would

cured by the collateral, and J. Kennedy Tod & Co. deemed it inexpedient, even though they were so disposed, to enter into a negotiation to put the directory of the Sioux City & Northern R. R. Co. under the control of persons who were either inexperienced and incompetent to handle the railroad property, or who might use their power to disrupt the relationship existing between these railway corporations. ¶

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pay it, and without which I wouldn't pay it, that I should have control?

"A. No.

"Q. Didn't that condition quickly arise in the conversation?

"A. No, you were more artful than that. You never said if we would give you control or continue the control you would pay the interest; you said if you paid the interest would we give you the control.

"Q. And you said that you would not?

"A. I said I couldn't, and I might have added that if I could I wouldn't.

"Q. Now, how did you understand that the control was to be given by you to me, in case you would have conceded it?

"A. I hadn't thought of the matter, as to the method of passing the control. * * *

(p. 510.) "The road was in control of competent, experienced, honest railroad men, and I was perfectly satisfied that it should remain so."

¶ J. Kennedy Tod testified (p. 510) that in an interview he stated to Mr. Coombs in answer to his questions that he was a director in the Great Northern Railroad, and that the Great Northern held one-third of the loan, and (p. 511) that the Great Northern road and all the people interested were satisfied with the management, "and the point involved there was that we couldn't give it to you. * * I was satisfied with the Board as then constituted. * * That the men I knew in the Board were good railway men."

Prior to the interview of September 25th, 1893, Mr. Coombs, Mr. Plummer and Mr. King had a consultation at which they agreed to make payment of the interest only upon condition that they should be placed in control of the properties. * When they met with J. Kennedy Tod & Co. they added another condition in the course of the conversation, that there should be a reduction of interest upon the loan, and a postponement of the time of payment. † These last named

(p. 512): I stated before that I hadn't power to give the control to begin with, and secondly I didn't think you were entitled to it.

"Q. Then it wasn't your satisfaction with the Board as it existed, but your dissatisfaction with any change that prevented it, was it?

"A. Unwillingness to make any conditions to you at all. The question was a straight question of what was due us, and you imported a whole lot of irrelevant conditions and stipulations that had nothing to do with the case."

* Mr. Plummer testified (p. 870), that there was a consultation between Mr. Coombs, Mr. King and himself before they visited the office of J. Kennedy Tod & Co. "After discussing the subject we concluded to make a payment of the interest upon the loan provided we were placed in control of the properties, as contemplated before we left Chicago."

† Mr. Plummer, in describing the interview with J. Kennedy Tod on the 25th of September, testified: (p. 873) that Mr. Coombs did the talking. He said in substance that the creditor of the Union Loan & Trust Company were organizing, and that they had come there for the purpose of making payment of ins terest upon the loan, and asked Mr. Tod "if he would not reduce the interest upon the loan or postpone some of the payments, giving the creditors more time to meet the payments, to which Mr. Tod said he could not consent. We also said that we desired to be placed in control of the properties, mean-

conditions not being acceptable to J. Kennedy Tod & Co., the committee were disposed to abandon all conditions except the demand that they should be put in the control of the Board of Directors of the Sioux City & Northern R. R. Co., but with this condition J. Kennedy Tod & Co. were without authority to comply, whereupon Messrs. Coombs, Plummer and King declined to pay the defaulted interest. ‡

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ing that we wanted a majority of the Board of Directors, and then we were willing to pay the money. * *

"Q. Why didn't you pay the interest?

"A. Because they refused to allow us to go into control of the properties."

(p. 874): "In substance that was the main question. There were many items spoken of in connection with it, but in the main we were disposed to receive a majority of the directors of the company or else not pay the interest on the loan."

(p. 877): "I think our counsel intimated that he was an expert at railroading and that he would accept the office of president of the road."

‡ Theophilus King testified: (p. 585.)

"The money was not paid over for the interest, because J. Kennedy Tod & Co. refused to take the money and give control of the corporation to the parties paying it or the creditors.

"Q. Was there any other condition imposed to the payment of the money or insisted upon by Mr. Plummer, yourself or me, except this control?

"A. None whatever."

J. Kennedy Tod testified: (p. 485.)

"Q. You remember, do you not, that you refused me control of the Board of Directors of the Sioux City & Northern on the ground that there were already four directors of that road in control, with a management satisfactory to the Great Northern Railroad Company?

"A. I had no power to comply with that request."

J. Kennedy Tod & Co. held these securities as trustees for other persons, and were not in a position to admit that this committee of creditors had any interest in the Sioux City & Northern R. R. Co. Such an admission or concession would have been antagonistic to the interests of the noteholders whom they represented, and which fact the committee understood. §

(p 488.) "I do not control the board of directors, nor am I in the position you suppose me to be in."

Theophilus King testified: (p. 535) that he visited the office of J. Kennedy Tod & Co. in company with Mr. Coombs and Mr. Plummer on the 25th of September, 1893, "and we then stated, Mr. Coombs being the spokesman, the fact that we had the money with us to pay that interest, and that we expected when that was done, that the control of the road, so far as a majority of the directorship should be concerned would be turned over under the direction of the creditors who had furnished the money to pay the interest. There was some discussion in regard to the directors, and it appeared that if one of those who was satisfactory at the present time to the creditors committee, should resign, that it would require a vote of those representing the Great Northern interest in order to elect a director that should be selected by the creditors, and it appeared from what Mr. Tod said that that would not be enough, they would not pass over the control of the road because they were interested with Mr. Hill of the Great Northern, and as I remember he disclosed the fact during the interview, that Mr. Hill furnished $500,000 of the money which made up the amount loaned on these securities in question, so that after considerable talk, it appeared that they were unwilling to take their interest money and turn over the control of the road."

§ Theophilus King testified: (p. 588) that the statement made to J. Kennedy Tod & Co. made us their antagonist on the question of title to the stocks of the Sioux City & Northern.

"Q. You knew at that time that J. Kennedy Tod & Co.

It was at the close of this conversation that the committee first gave to J. Kennedy Tod & Co. any intimation that there was any question about the right of J. Kennedy Tod & Co. to hold these securities.

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could not admit that you had any interest whatever in the Sioux City & Northern Railroad Company without admitting that they, J. Kennedy Tod & Co., had less interest than they claimed to have in it, did you not?

"A. That is natural."

(p.589): "Q. You knew at that time that J. Kennedy Tod & Co. claimed as trustees to hold the entire stock of that company, did you not?

"A. I could not answer that in the affirmative to 100%."

Theophilus King testified (p. 583) touching what was said at the interview of September 25th, 1893:

"Q. Was there anything said about J. Kennedy Tod & Co.'s title to the securities?

"A. There was.

"Q. What was it?

"A. The question was, as I remember it, brought forward by Mr. Coombs, in which he questioned whether the securities could be held by Kennedy Tod or whether they were so in possession in the making of the loan as to have them without any colorable title."

Theophilus King testified: (pp. 586–7.) We were not creditors of the Sioux City & Northern road. Our claim was that our money through the Union Loan & Trust Company had gone to the construction of that road and we wanted to get our money back from the property into which it had gone, and we thought to get control of the Sioux City & Northern the most potential way. The creditors having examined into the facts, believed that J. Kennedy Tod & Co. had not rightfully came into possession of those securities, and that the securities were more properly the property of the creditors.

(p. 588): "We were there in good faith to pay the interest

They followed up this intimation with a written notice that they denied the title to and right of possession in J. Kennedy Tod & Co. over the securities, and demanded their surrender, and made this demand by reason of the fact that J. Kennedy Tod & Co. would not agree to give them the control of the railway properties. ¶

This was the first time that any persons representing the Union Loan & Trust Company, or representing its creditors ever questioned the right of J. Kennedy Tod & Co. to hold the securities, and it will be observed that this was nearly two months after the default in the payment of interest on the loan, and was after the securities had been advertised for sale and after the postponement of the first date fixed for the sale, and was the day preceding the day when the sale actually took place. It is further worthy of note that the bonds so held by J. Kennedy Tod & Co. under the indenture of trust were the bonds of the Sioux City, O'Neill & Western Railway Company, and not the bonds of the Sioux City & Northern Railroad Company, and it was of the directory of the last named company that the committee demanded control.

The right of J. Kennedy Tod & Co. to hold the securities became vested in them at the date of the indenture of trust, December 31st, 1892, which was nearly a year preceding the happenings of the above mentioned events, and default having been made, they

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under those conditions and to take possession of the control of that corporation, and we then and there raised the question as to how far they were right in the possession of those securities. They were questions which made their hold of them colorable."

¶ For a copy of this demand, see rec. p. 1175.

properly proceeded with the sale, pursuant to the demand of the note-holders and the public notice which had been given. *

XIII.

J. Kennedy Tod & Co. had Good and Sufficient Reason to rely on the Statements and Representations of Garretson that he was the Owner of the Bonds and Stock in Controversy.

Garretson was a man of large business experience and prominent in banking, financial and railroad circles, at the time when he began his dealings with J. Kennedy Tod & Co., and so continued to be until the collapse of the Union Loan & Trust Company, April 24th, 1893. ** He had been cashier of the Sioux City Sav-

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* Theophilus King testified: (p. 597) that he was in New York on the 25th of September at the time of the interview with J. Kennedy Tod & Co., and knew that the sale of the securities was to take place on the 26th of September, and that he understood that Mr. Plummer and Mr. Coombs were present at the sale of the securities.

Mr. Plummer testified: (p. 881) that Mr. Coombs and himself attended the sale of the securities upon the 26th day of September, 1893, "at the real estate auction room—I think that is the name of it—the Real Estate Exchange and auction room."

** He was the cashier of the Sioux City Savings Bank from 1874 to 1880 (rec. 688) and was cashier of the Sioux National Bank from 1880 to 1890 (rec. p. 689.) He was one of the organizers of the Union Loan & Trust Company in 1885, and was its vice-president and one of its directors from that date until the assignment to Hubbard in April, 1893. (rec. p. 689.) He became interested in the building of the Sioux City & Northern Railroad in 1889, and was one of the five persons who formed the syndicate which built that road. (rec. p. 691.)

ings Bank, the Sioux National Bank, and he was one of the chief promoters and builders of the Sioux City & Northern Railway, and he organized the Union Loan & Trust Company. †

He came to J. Kennedy Tod & Co. highly recommended, first through a personal interview with James

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(p. 692). "Q. Did you consult with anybody in regard to the ways and means for constructing it?

"A. I frequently attended interviews in St. Paul with reference to the projected line. * *

"Q. With whom and where?

"A. With Mr. Manville, vice president of the Great Northern railroad, Colonel Clough, of the same company, and James J. Hill, of the same company." (rec. p. 692.)

He negotiated a traffic contract with the Manitoba Company, which then controlled the properties now embraced in the Great Northern system in Minnesota, Wisconsin and Dakota. (rec. p. 692.) He was one of the parties who undertook to negotiate the sale of the Sioux City & Northern Railroad Company bonds to the Manhattan Trust Company and banking companies in New York before they were issued. (rec. pp. 692-3.

† He was the vice president of the London & Sioux City Finance Company (p. 755) and remained connected with that company until August, 1891. (rec p. 756.) He was the treasurer of the Sioux City & Northern during its early stages, and afterwards became president of that railway company. (rec. p. 756.) He was the president of the Terminal Railroad & Warehouse Company (rec. p. 756) and was the president of the Sioux City, O'Neill & Western Railway Company as reorganized. (rec. p. 756.) He was a director in the Sioux City Life Indemnity Company, an insurance company, and was a director in the Sioux City Packing and Provision Company, and a director in the Union Stock Yards Company, (rec. p. 756) and had been prominently connected with most of the active industries of Sioux City during four or five years prior to 1894. (rec. p. 756.)

J. Hill, the President of the Great Northern Railway Company in 1890, and later by a letter of introduction from James J. Hill in the year 1891. ‡ J. Kennedy Tod was a director in the Great Northern Railway Company, ‖ and hence had every reason to believe that the president of that company would not introduce Garretson to his firm for an important financial transaction unless he was entitled to credit, in the full sense of the word.

During the time when Garretson had his negotiations with J. Kennedy Tod & Co., they believed he

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‡ J. Kennedy Tod testified: (rec. p. 469). "He brought a letter of introduction from Mr. Hill. That was, however, after a personal interview by Mr. Hill. I think he personally brought him into the office in the autumn of 1890, following it up the following year with a letter of introduction."

‖ "Q. You are a director now (of the Great Northern Railway)?

"A. I am.

"Q. And were you a director during all of the transactions you had with A. S. Garretson?

"A. I was.

"Q. Mr. J. J. Hill is president of the company, is he not?

"A. He was." (rec. p. 468.)

Again: (p. 1319) "He had been introduced to me sometime previously as a responsible and reliable man"—again: (p. 1330.)

"Q. Who gave him that recommendation?

"A. Mr. James J. Hill, the president of Great Northern Road.

"Q. Anybody else?

"A. Everybody that spoke about Garretson spoke well of him. There were a great many of them that would testify to his good character but I regarded Mr. Hill's recommendation sufficient.

was a man of great wealth, and that he owned the bonds and stocks which he presented to them. §

§ W. S. Tod testified for the intervenors: (p. 426). "We believed that Mr. Garretson was a man of very great wealth, that he owned the O'Neill & Western bonds, that he owned the Sioux City & Northern stock—that it was in great part registered in his name—the bonds were "bearer" bonds, we believed that he owned those collaterals, that he had been borrowing money upon them in other places, and that he had a right to pledge them."

Again, J. Kennedy Tod testified for the intervenor: (p. 471.) in answer to questions as to what he knew about the Nebraska & Western bonds in July, 1891, that he thought the bonds were issued "at a certain rate per mile; that the road had a certain earning capacity, free of floating debt, well equipped and through a good country.

"Q. Who told you that?

"A. Mr. Garretson and Mr. Hedges.

"Q. As a matter of recollection those two gentlemen in June and July, 1891, made those representations to you, did they, in selling the Nebraska & Western bonds?

"A. Yes.

"Q. And you relied upon those representations?

"A. Oh, not entirely. At one time we sent an expert out to examine the property independently and to report to us on it.

"Q. You regarded them as good bonds?

"A. I would not call them first class bonds, I thought they were good enough security along with other collateral pledged."

Again he testified: (p. 472.)

"I believe he controlled the bonds, all of them.

"Q. What makes you think so?

"A. He always said so. He represented the owners of them, whoever they were."

Again he testified: (p. 474.)

"I thought Garretson's reputation was good to begin with;

XIV.

J. Kennedy Tod & Co. Accepted the Securities in Good Faith and Without Knowledge or Notice of any Claim of the Union Loan & Trust Company Thereto.

J. Kennedy Tod & Co., as early as June, 1891, received from Garretson $200,000 Nebraska & Western

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I thought he was a man of property, of character; I thought the mortgages sufficiently valuable to secure the loan.

"Q. What did you know about Garretson to make you think that his obligation was good?

"A. He was very highly recommended to me as an energetic, upright, intelligent business man, in substance.

"Q. Who so recommended him?

"A. Mr. Hill."

Prior to the loan of $1,000,000 by J. Kennedy Tod & Co to Garretson, J. Kennedy Tod had been to Sioux City, and he testified: (p. 482.)

"Q. Now what had you learned about Garretson in the meantime?

"A. I had seen a good deal of him, had obtained a favorable impression of him, had been out at Sioux City and had been introduced to his associates, had spent a day going over the road with him."

On p. 491 he further testified:

"Q. At the time this contract was made, what else had you learned, if anything, of his ability?

"A. I have already told you that I had been out there and had met his associates, spent a day going over the property and heard a great deal of talk.

"Q. Who had you met?

"A. Met by Mr. Garretson in a private car with about 15 or 18 gentlemen who were introduced to me by names that I cannot possibly recall now, as the leading citizens of Sioux City."

bonds as collateral to a loan of $75,000, without notice of any claim thereto by any other parties.

It is endeavored by the intervenor to charge J. Kennedy Tod & Co. with notice of the lien of the Union Loan & Trust Company by offering testimony to the point that J. Kennedy Tod & Co. knew of the dealings between the Manhattan Trust Company and the Wyoming-Pacific Improvement Company, but this knowledge is denied. *

Further he testified: (p. 492).

"Many of these gentlement to whom I have referred as my fellow passengers during that day in the private car spoke in very loud praise of Mr. Garretson as a business man, an honest man; he was a wealthy man.

"Q. Did you know that Mr. Garretson was an officer in the Union Loan & Trust Compan ?

"A. At that time?

"Q. Yes?

"A. No, I had never heard of the Union Loan & Trust Company then, to the best of my recollection."

Even Theophilus King, vice-president of the National Bank of Redemption, of Boston, and president of the Granite Bank of Quincy, and a member of the creditors' committee of the Union Loan & Trust Company, and who was one of the persons who with Coombs and Plummer visited J. Kennedy Tod & Co. to talk over the situation, and who was examined as a witness on behalf of the intervenors, is unable to state any fact or circumstance which would have conveyed to J. Kennedy Tod & Co. any knowledge that Garretson was without authority to sell or pledge the bonds and stocks, and the most he states is that if what he heard is true, he believed they should have been "very careful in their transactions with him," (p. 596) but when asked to state any particular fact or circumstance to justify that belief, he is unable to do so.

* J. Kennedy Tod testified: (p. 1318).

"Q. When did you first make any loan to Mr. A. S.

J. Kennedy Tod & Co. had no knowledge of the loan transactions in behalf of the Wyoming-Pacific Im-

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Garretson with collateral of the Nebraska & Western bonds?

"A. I believe in June, 1891.

"Q. Was that before or after you had purchased the Sioux City & Northern bonds?

"A. After.

"Q. And had you any knowledge concerning the prior history or ownership of the Nebraska & Western bonds at that time?

"A. I had not.

"Q. The bonds were delivered to you, were they?

"A. I believe so—$200,000 I believe, to secure $75,000. * *

"Q. At any rate, at that time did you know anything about the bonds other than that Mr. Garretson purported to be the owner?

"A. No."

Again, (p. 1319):

"Q. At any time when the Nebraska & Western bonds were deposited with you by Mr. Garretson as collateral for any loans, had you any notice of any claim to them by any other parties?

"A. Never.

"Q. At any time when Sioux City, O'Neill & Western bonds were deposited with you as collateral to any loan you had any knowledge of any claim to them on behalf of any other parties than those with whom you dealt?

"A. No.

"Q. At any time when Sioux City & Northern stock was deposited with you, had you any notice or knowledge of any claim to the stock by any parties other than Mr. Garretson and his associates, Hedges, Haakinson and Hornick?

"A. No."

provement Company, and had no connection therewith. † But even were this true, it would not be notice or proof of notice of any claim of lien on the securities by the Union Loan & Trust Company.

It is endeavored to show by the testimony of Mr. Hedges that at a prior date William S. Tod had inquired of him who were the officers of the Union Loan

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† J. Kennedy Tod testified: (p. 1320.)

"Q. Did you know anything about the Wyoming-Pacific Improvement Company?

"A. No.

"Q. Did you know anything about loan transactions between the Manhattan Trust Company or through the Manhattan Trust Company with the Wyoming-Pacific Improvement Company?

"A. No.

"Q. You had nothing to do with those?

"A. Nothing whatever.

"Q. Any knoweldge of them?

"A. None whatever.

"Q. Did Mr. Northcote, while he was a director of the Manhattan Trust Company, give you any information concerning the Wyoming-Pacific Improvement Company?

"A. Nothing.

"Q. Or the Nebraska & Western Railway Company?

"A. No.

"Q. Or transfers through the Manhattan Trust Company concerning the Nebraska & Western bonds?

"A. Never heard of them from him or anybody else. I don't think he was a director of the Trust Company at the time you refer to.

"Q. If he were, he never told you anything about it?

"A. He did not.

& Trust Company, but Mr. Tod denies that any such conversation took place. ‡

J. Kennedy Tod & Co. had no knowledge or notice of any claims of the Union Loan & Trust Company to these securities at or before the time when the securities were pledged to secure either the loan for $1,000,000 or the loan for $1,500,000, and the first they knew of any such claim was when the same was made by Mr. Coombs, representing the creditors of the Union Loan & Trust Company, and which was not until after default had been made in the payment of interest on the loan for $1,500,000, and which was in July or August, 1893. §

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‡ W. S. Tod testified: (pp. 1365–6.)

"Q. Do you recollect an interview with Mr. Garretson and Mr. Hedges at your office at the time when payment was being made for the Sioux City & Northern bonds?

"A. Yes, I recollect that they were there.

"Q. Do you recollect whether or not at that interview you stated to Mr. Hedges, 'Mr. Hedges, are you an officer of the Union Loan & Trust Company?' and he replied, 'No, sir,' and then you asked, 'Who are the officers of the Union Loan & Trust Co.?' and he replied, 'Mr. E. R. Smith is secretary, Mr. Garretson is director, and Mr. Joy is president,' and you then said, 'Mr. Garretson is also vice-president?' and he said, 'Yes, I thought so?'

"A. To the best of my knowledge and belief no such conversation ever took place."

§ J. Kennedy Tod testified: (p. 1318).

"Q. Now, Mr. Tod, did you, at or before the time of closing the loan of $1,500,000 have any knowledge or information or any intimation from any source that any parties other than the Pacific Short Line Bridge Company, A. S. Garretson, D. T. Hedges, John Hornick and Ed. Haakinson had any interest in or claim to the securities pledged for that loan?

LAW OF THE CASE.

I.

The Contract of Pledge with the Union Loan & Trust Company was so Indefinite and Uncertain that no Rights Could be Predicted Thereon. The Agreement was not Accompanied by an Immediate Delivery of the Securities; Hence was Invalid. At most it was but an Agreement to make a Pledge. The securities were not in Existence at the time. The Contract Rested in Parol; Hence was Void Under the Statute of Frauds.

The railroad syndicate was organized July 3rd, 1889, but the syndicate agreement made no reference

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"A. No.

"Q. Had you ever heard or had any statement from any person of any claim to those securities on behalf of the Union Loan & Trust Company of Sioux City?

"A. Never.

"Q. Had you any reason at that time to suppose that any persons other than the parties with whom you were dealing had any interest whatever in those securities?

"A. No."

W. S. Tod testified (p. 1361), that at or prior to the time of the $1,500,000 loan agreement, he had no knowledge that there were any claims against the Bridge Company; (p. 1362) that he was not in any way connected with the Wyoming-Pacific Improvement Company, and knew "Absolutely nothing" whatever about it; that he knew nothing whatever about the relations between the Wyoming-Pacific Improvement Company or the Nebraska & Western Railway Company and the Manhattan Trust Company, and that Mr. Northcote never mentioned that subject to him.

"Q. Did you ever hear of any claim to, right in, lien

either to the borrowing of money through the Union Loan & Trust Company, nor to the depositing or pledging of securities. * Whatever may have been said to the Union Loan & Trust Company about pledging the railroad securities, was before or at about the time of the making of the above syndicate agreement, and must have rested in a conversation between Garretson on the one hand and Smith, as secretary and treasurer of the Union Loan & Trust Company, upon the other hand. According to the testimony of John Hornick, the other members of the syndicate only knew of this arrangement as it was talked over between the members of the syndicate at the time of the execution of the syndicate agreement. There was no written con-

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upon or interest in any of the securities described in the agreement for the $1,500,000 loan?

"A. I never heard of any such thing until about July or August of 1893, after the default in the interest had taken place.

"Q. Prior to that time what information had you as to the ownership of those securities?

"A. I believed that they belonged to Mr. Garretson.

"Q. What is that belief grounded upon?

"A. I should say by Mr. Garretson and sometimes that some of his asssociates had an interest; I think the belief is grounded upon statements made to me by Mr. Garreston.

"Q. Did you ever hear from any source that the Union Loan & Trust Company of Sioux City had any interest in these securities?

"A. I never did, until, possibly in July or August of 1893, after the default.

"Q. Then whom did you hear it from first?

"A. My recollection is that Mr. Coombs was the first party who ever made such an intimation to me."

* See pp. 28-9 of this brief.

tract between any of the parties touching this subject. † Whatever was said between Garretson and Smith, as secretary and treasurer of the Union Loan & Trust Company, related only to the securities of the Sioux City & Northern Railroad Company, as that was the only corporation in which the syndicate then contemplated becoming interested, ‡ and at that date the Sioux City & Northern had not been constructed, as this syndicate agreement was only preliminary to the building of that road. The securities were not then in existence. The mortgage on the Sioux City & Northern was not made until the first day of January, 1890, and the bonds were to bear the same date, § and were not issued and certified until after the date last named. The same is true of the stock; hence it follows that the securities of the Sioux City & Northern Railroad Company contemplated under the supposed agreement of pledge were not delivered, nor was it possible for the same to be delivered to the Union Loan & Trust Company within a period of six months after the parol pledge agreement may have been entered into.

It is an essential element of a contract of pledge that there shall be an immediate delivery of the securities. To hold otherwise would make such a contract of pledge an instrument of fraud, as against third persons who might buy or come into possession of the securities. *Casey vs. Caveroc*, 96 U. S., 467. ‖

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† See foot-note, p. 30 of this brief; also pp. 34–5, with foot-notes thereto.

‡ See foot-notes on pp. 36–7 of this brief.

§ See rec., pp. 23–4–5–6.

‖ In *Casey vs. Caveroc*, 96 U. S., 467, Mr. Justice Bradley said: (p. 477).

The most that can be said of the agreement in the case at bar is that it was an agreement to make a pledge, and such an agreement would raise no privilege in favor

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"The difference ordinarily recognized between a mortgage and a pledge is, that title is transferred by the former and possession by the latter. Indeed, possession may be considered as of the very essence of a pledge; * * and if possession be once given up, the pledge as such, is extinguished."

Again, p. 482: "As might be supposed, this article has formed the subject of much discussion by the commentators. Troplong says: 'The pledgee has this privilege only on the condition of being possessed of the thing. * * * Possession is indispensable to him. It withdraws the thing from the hands of the debtor and from the actions of creditors, and sets it aside in a privileged situation.'"

Again, pp. 484–5: "From these authorities it seems to be evident that, in the French law at least, the text of which, in this regard, is the same as that of Louisiana, a delivery by the owner of securities by way of pledge, followed by a return thereof to him for the purpose of enabling him to collect them and apply the money to his own use, on substituting others in their stead, and with general liberty of substitution, and to appear as the owner and possessor thereof in his dealings with others (the title of the securities not being transferred to the creditor), is not such a delivery of possession as is necessary to establish the privilege due to a pledge as to third persons. It would be contrary to the very letter of the law to allow such a transaction to have that effect. It would not be mere evidence of fraud, which might be rebutted by counter evidence; but it would be contrary to the rule of law adopted to prevent fraud. In other words as to third persons, it would not be a pledge at all within the meaning and requirements of the law."

of the Union Loan & Trust Company. *Casey vs. Caveroc*, 96 U. S., 467. ¶

Such a transaction ignores an inexorable rule of law, adopted to prevent fraud and deception, towit, the immediate delivery to the pledges of the securities. *Casey vs. Caveroc*, 96 U. S. 467. *

The claim of the intervenor, based on the right of the Union Loan & Trust Company to the Nebraska & Western bonds, and the Sioux City, O'Neill & Western bonds, is even more uncertain and equally faulty. The

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¶ In *Casey vs. Caveroc, supra*, the court said : (p. 486.)

"A pledge, and possession, which is its essential ingredient, must be made out, or their privilege fails An agreement for a pledge raises no privilege."

* In *Casey vs: Caveroc*, 96 U. S., *supra*, the court said : (p. 490.)

"The Credit Mobilier claims a privilege by virtue of a pledge; and such a privilege, as we have seen, cannot be maintained as to third persons, without possession. Bad faith, it is true, would defeat the pledge though the creditor had possession. But want of possession is equally fatal, though the parties may have acted in good faith. Both are necessary to constitute a good pledge so as to raise a privilege against third persons. The requirement of possession is an inexorable rule o law, adopted to prevent fraud and deception; for, if the debtor remains in possesion the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods."

And again : (p. 491.)

"On this ground, therefore, of want of possession in the pledgee, or of a third person agreed upon by the parties, and of actual possession and control in the pledgor, we feel compelled to hold that the Credit Mobilier had no privilege as to third persons, and that the receiver was entitled to the securities in question."

Nebraska & Western mortgage bears date the first day of July, 1889, and on the 15th day of March, 1889, the Nebraska & Western Railway Company had entered into a construction contract with the Wyoming-Pacific Improvement Company by which all of its bonds, when issued and certified by the Manhattan Trust Company, were to be turned over to the Improvement Company in part payment of the cost of construction,† and the syndicate agreement relating to the Nebraska & Western was not executed until February 15th, 1890. ‡ Thus the bonds of the Nebraska & Western were not in the possession or under the control of the railroad syndicate; hence it was without authority to pledge the same, and it was impracticable for it at that time to deliver the possession of the said bonds to the Union Loan & Trust Company. §

Neither does it appear affirmatively in the record that there was any agreement made directly with the Union Loan & Trust Company that the Nebraska & Western bonds should be deposited with it in pledge. All that appears in the record on this point is that some of the members of the syndicate say they understand that the same agreement as to the pledge of the securities

† See rec., p. 1464; also pp. 64–65–66 of this brief.

‡ See p. 69 this brief and foot-note same page; also rec. p. 1037.

§ *Bidstrup vs. Thompson*, 45 Fed. Rep., 452, was a case where the "debtor had placed it beyond his power to deliver it, (the certificate) for he had placed it in the custody of another party for a year as security for the performance of another contract," and it was ruled the contract of pledge was invalid because there was not and could not be a delivery of the securities to the pledgee. "That delivery is essential to make a pledge is maintained by all the decisions of our Supreme Court."

should apply to the Nebraska & Western bonds. § This is so extremely, indefinite and uncertain that no rights could be predicated thereunder, unless there was an actual and immediate delivery of the possession of the securities, and which did not take place.

It appears from the record that all the bonds when certified by the Manhattan Trust Company remained in its possession. The $2,100,000 of bonds remained in the possession of the Manhattan Trust Company under the indenture of Trust of Februrary 1st, 1890, to secure the underwriter's loan of $1,050,000, ‖ and the residue of the bonds remained with the Manhattan Trust Company to secure other loans, and it was not until the 2nd of December, 1890, ¶ when the Manhattan Trust Company transmitted to the Union Loan & Trust Company 500 of those bonds, which was nine months and a half after the executory agreement of pledge was made with the Union Loan & Trust Company, if as a matter of fact any such agreement was ever made. The next and only additional delivery of possession of Nebraska & Western bonds to the Union Loan & Trust Company was the 933 bonds transmitted to it by J. Kennedy Tod & Co. under date of *Aug.* 7, 1891. *

§ See Haakinson's testimony, p. 911, and testimony of John Hornick, p. 897. The writer of this brief does not recall a single line of testimony directly to the point of any conversation or agreement between the syndicate and the Union Loan & Trust Co.; that the Nebraska & Western or the Sioux City, O'Neill & Western bonds should be deposited with the Union Loan & Trust Co. in pledge.

‖ See Waterbury's testimony foot-note on p. 83 of this brief and pp. 67–8 and foot-notes thereon.

¶ See top of foot-note p. 83; also testimony of Waterbury, rec. p. 1426 and foot-notes on pp. 94–95.

* See pp. 95–96 this brief and rec., pp. 653–654–655.

There is nothing in the record by way of written correspondence or parol evidence asserting or indicating that either of these deliveries of Nebraska & Western bonds to the Union Loan & Trust Company was under any claim of right on the part of the Union Loan & Trust Company to receive the same under any agreement of pledge, ¶ but the fact that Garretson assumed to withdraw these securities at pleasure, and the Union Loan & Trust Company, through E. R. Smith, its secretary and treasurer, parted with these securities at the request of Garretson, strongly indicates that the Union Loan and Trust Company was simply the custodian for A. S. Garretson, as a mere matter of safety and convenience. The correctness of this conclusion is enforced by the fact that Garretson did not obtain the money through the Union Loan & Trust Company to take up the Nebraska & Western bonds. It is possible that the $350,000 provided for in the syndicate agreement of February 15th, 1890, may have come through the Union Loan & Trust Company, but the money to take up the bonds which the Improvement Company had pledged behind the underwriter's agreement was borrowed from other parties, through the

¶ No entries appear in the books of the Union Loan & Trust Co. showing these securities to have been received or held by it as collateral to syndicate paper. Hubbard, assignee, testified: (p. 933.) "Q. Is there anything in the books of the Union Loan & Trust Co. to show what if any other collateral was held by the Union Loan & Trust Co. for railroad syndicate paper?

"A. No, sir.

"Q. Or what if any collateral was at any time held by the Union Loan & Trust Co. for the railroad syndicate paper?

"A. Nothing in the books.

Manhattan Trust Company, and the Manhattan Trust Company itself made to Garretson the first loan of $500,000 secured by the $750,000 of Sioux City & Northern bonds, to take up the loan of Belmont & Co. †

Garretson was in possession of all the Nebraska & Western bonds in June, 1890, for on June 3rd and June 24th, 1890, he caused all of said bonds to be sold and purchased in his name at public auction in New York, under the terms of the indenture of trust between the Wyoming-Pacific Improvement Company and the Manhattan Trust Company. ‡ In June and July, 1890, Garretson apparently pledged all of these bonds behind a series of notes on which he borrowed money, and from which it appears that no part thereof were negotiated through the Union Loan & Trust Company. §

Again, when the Nebraska & Western bonds were turned into court upon the foreclosure of the Nebraska & Western, $1,000,000 of the bonds were in the possession of J. Kennedy Tod & Co., and were transmitted to their agent and attorney, Mr. Wickersham, at Omaha, and $150,000 were also transmitted by J. Kennedy Tod & Co., being received by them from the Merchants' National Bank, and being the bonds which at the direction of Mr. Garretson had been turned over to the St. Charles Car Company, and the remainder of the issue, $1,433,000, were turned over by Mr. Garretson to Mr. Wickersham, as the agent and attorney of J. Kennedy Tod & Co., ‖ and which amount would represent the 500 bonds transmitted to the Union Loan & Trust Company December 2nd, 1890, and the 933 bonds transmit-

† See p. 72 of this brief and foot-note on p. 72 and p. 73 of this brief.

‡ For the record on this point, see p. 83 of this brief.

§ See p. 79 of this brief.

‖ See p. 87 of this brief and foot-notes, pp. 87–88.

ted to the Union Loan & Trust Company by J. Kennedy Tod & Co. under date of Aug. 7, 1891. It thus becomes perfectly clear that the Union Loan & Trust Company never had possession of any of the Nebraska & Western bonds except those last above indicated.

Again, the Union Loan & Trust Company never had possession of the Sioux City, O'Neill & Western bonds. While the officers of the Sioux City, O'Neill & Western were having their office in the place of business of the Union Loan & Trust Company, and may there have signed the bonds,† they were transmitted to the Manhattan Trust Company for certification, and after certification were delivered by the Manhattan Trust Company to J. Kennedy Tod & Co.,‡ and have ever since remained in the possession of J. Kennedy Tod & Co. §

Even though J. Kennedy Tod & Co. be not without fault in the receiving of the securities, and the relative merit and demerit of the respective claimants, the Union Loan & Trust Company and J. Kennedy Tod & Co., be equal, the pledge cannot be sustained, by reason of the failure of immediate delivery of possession of the securities to the Union Loan & Trust Company. *Casey vs. Caveroc*, 96 U. S., 467.*

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† See pp. 98–99 and foot-note p. 99 this brief.

‡ See pp. 98–99 this brief and foot-notes, those pages.

§ Smith admits U. L. & T. Co. never afterward had these bonds. See foot-note on p. 101 this brief.

* In *Casey vs. Caveroc*, *supra*, Mr. Justice Bradley said: (p. 491).

The claimants "might not have given credit to the common debtor had he not remained in possession of the goods, and appeared to continue as the absolute owner thereof. If the pledge should be sustained, they would have good cause to com-

It may be claimed by the intervenor that a court of equity will consider that these securities had been delivered to the Union Loan & Trust Company; but a court of equity will not consider a thing to be performed which was impossible of performance, nor where the application of the principle would tend to the injury of third parties. *Casey vs. Caveroc*, 96 U. S., 467. †

That the agreement of pledge to the Union Loan & Trust Company is void for uncertainty may be made apparent by a question: If the $2,583,000 Nebraska & Western bonds and the $2,340,000 Sioux City, O'Neill & Western bonds are under a pledge to the Union Loan & Trust Company, the inquiry arises—Pledge for what? There is no proof in the record of any definite advances by the Union Loan & Trust Company on the credit of these securities. There is nothing sufficiently defined for a court of equity to enforce.

The rule requiring the immediate delivery to the pledgee of the securities pledged, as an essential ele-

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plain that they had been deceived by the acts of the parties setting up the pledge. So that, on the question of relative merit and demerit, the parties are in all respects equal. It is on this principle that the law is founded."

† In *Casey vs. Caveroc, supra*, Mr. Justice Bradley said: (p. 491). "These considerations also supply an answer to another suggestion, that equity will consider as done what the parties intended should be done, which it is assumed was, in this case, a transfer of the title of the securities. Equity will not exercise this power when it would injure third persons who have incurred detriment, and acquired consequent rights by the acts that are done. Such detriment has, in the view of the law, been incurred in this case, and such rights have, by the express letter of the law, accrued."

ment of a contract of pledge, is one quite universally accepted. Thompson on Corporations. Sec. 2615. * Cook on Stockholders, 3rd., Ed., Vol. 1, Sec. 463; † *Lalande vs. Ingram*, 19 La. Ann., 364; ‡ *Geilfuss vs. Corrigan, et al.*, 95 Wis., 651. § *Christian vs. Atlantic & N. C. R.*

* "The essential idea of a pledge is that it is effected by a delivery of the thing pledged; and hence it is often said that delivery is essential to the creation of a valid pledge."

† "In pledges the thing pledged must be delivered to the pledgee."

‡ In this case the pledgor did not have possession of the certificates and attempted to pledge them by notarial act. The court said: (p 368).

"Shares of stock cannot be pledged unless they be evidenced by certificates, which must be transferred and delivered to the pledgee. In this case there were no such certificates of stock, therefore nothing was or could be delivered to Lalande. * * * We are of opinion that Lalande acquired no right to said stock as pledgee or transferee."

§ In *Geilfuss vs. Corrigan, et al.*, the court said: (p. 665).

"The principles of law governing a pledge of personal property are simple and familiar. To constitute a pledge, there must be transfer of possession to the pledgee, actual or constructive * * * In the case of a pledge, a lien is created, to the existence of which possession is absolutely necessary." Again, referring to the ruling in *Casey vs. Caveroc*, 96 U. S., 467, the court said: (p. 671.) "No reason is perceived why this is not wholesome doctrine, nor why it does not apply with equal force to possession by a third person, with power of sale and substitution, as in the present case. Our conclusion is that, as against third persons, the bank never perfected its pledge by obtaining possession, either actual or constructive, of the iron named in the certificates, and hence that it cannot maintain this action."

R. Co., 133 U. S., 233. ‖ *Atkinson vs. Foster*, 134 Ills., 472. ¶ *Seymour vs. Hendee et al.*, 54 Fed. Rep., 563.

II.

There is Nothing in the Record Showing any Contract of Pledge of the Nebraska & Western Bonds or Sioux City, O'Neill & Western Bonds, Except the Indefinite Understanding at the Date of the Syndicate Agreement of February 15th, 1890, and at that time the Syndicate did not own and did not Contemplate Acquiring Title to Said Bonds, Hence no Agreement to Pledge Said Bonds.

At the date of the syndicate agreement of February 15th, 1890, the title to the Nebraska & Western bonds was in the Wyoming-Pacific Improvement Company.

‖ The court said : (p. 242.)

"In the case of stocks and other choses in action, the pledgee must have possession of the certificate or other documentary title, with a transfer executed to himself or in blank (unless payable to bearer) so as to give him the control and power of disposal of it. Such things are then called pledges, but more generally collaterals, and they may be used in the same manner as pledges properly so-called."

¶ The court said : (p. 480.) "That a pledge of property can only be sustained against such (third) parties when the thing pledged is actually delivered to the pledgee, must be admitted. In fact, a pledge, strictly speaking, can only be made by delivery."

In *Seymour vs. Hendee, et al., supra*, it was said :

"It is of the essence of the contract that there should be an actual delivery of the thing to the pledgee. Until the delivery of the thing, the whole rests in an executory contract, however strong may be the engagement to deliver it; and the pledgee acquires no right of property in the thing."

and they were on deposit with the Manhattan Trust Company under the indenture of trust of February 1st, 1890. *

It was not possible for the syndicate to pledge the securities to the Union Loan & Trust Company which it did not own and of which it was not in possession. The Union Loan & Trust Company does not contend that it was in ignorance of this condition of affairs.

Again, what may have been said, if anything, between the members of the syndicate and the Union Loan & Trust Company at the date of the syndicate agreement of February 15th, 1890, evidently did not go beyond what was then contemplated by the parties. That syndicate agreement only contemplated an advance of $350,000 on account of the Nebraska & Western, $250,000 of which was on account of the subscription of Garretson and Hedges to the underwriters' agreement, and the remaining $100,000 of which was to be by way of subscription to the Wyoming-Pacific Improvement Company certificates. † There is no proof in the record of any agreement of pledge being entered into at any subsequent date between the syndicate and the Union Loan & Trust Company touching these bonds; hence we feel justified in making the assertion that there never was any agreement to pledge the Nebraska & Western bonds or the Sioux City, O'Neill & Western bonds to the Union Loan & Trust Company.

The money by which Garretson and his associates acquired the Nebraska & Western bonds was procured in the

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* See Part VII of this brief, beginning at p. 64.

† For syndicate agreement, see rec. p. 1037. See also pages 69 and 70, this brief.

first instance by loans through the Manhattan Trust Co., and secondly by the $1,000,000 loan through Tod & Co., and lastly by the $1,500,000 loan now outstanding.

The claim of the Union Loan & Trust Co. to a lien on these securities, by reason of advances made to the syndicate to acquire the same, is directly and positively disproven by the record. The principle invoked by the intervenor to establish a lien sustains the lien of J. Kennedy Tod & Co.

III.

The Union Loan & Trust Company lost Whatever Lien, if any, it had to the Securities when it Permitted the same to pass out of its Possession.

For a statement of the facts and evidence to sustain the point that the Union Loan & Trust Company voluntarily parted with the possession of such securities of the Sioux City & Northern R. R. Co. as came into its possession, including the stock of that company in controversy in this suit, we refer to part VI of this brief, beginning at p. 55.

The Union Loan & Trust Company also redelivered to Garretson the $1,433,000 Nebraska & Western bonds which it held as the custodian for Garretson, with full knowledge that said bonds were to be surrendered to the court in the foreclosure proceeding, * and which are the same bonds which Mr. Garretson delivered to Mr. Wickersham, as the attorney and agent of J. Kennedy Tod & Co., † and which bonds were also covered by the contract of October 1st, 1891, for the loan of

* See pp. 87 to 92 of this brief and foot-notes thereto.

† See pp. 90, 91 and 92 of this brief and foot-notes thereto.

$1,000,000 to be made by J. Kennedy Tod & Co., and the fact of which loan Mr. Garretson had made known to Mr. Smith, the secretary and treasurer of the Union Loan & Trust Company. ‡

When the Sioux City, O'Neill & Western bonds were executed at Sioux City, they were transmitted to the Manhattan Trust Company for certification, and delivered to J. Kennedy Tod & Co. under the terms of the loan agreement for $1,000,000, under date of October 1st, 1891. § At this time no claim was made by the Union Loan & Trust Company, and no notice given by it to anybody that it claimed these bonds under any pledge, nor that the bonds were to be returned to it.

When these securities passed from the possession of the Union Loan & Trust Company, either to Mr. Garretson in person or to other persons, subject to his order and direction, it operated to terminate any lien the Union Loan & Trust Company may have had as pledgee. An essential and primary principle of a pledge is not only that the pledgee shall be put in possession of the securities, but that the pledge shall only continue so long as the pledgee shall remain in such possession. When the pledgee parts with possession,

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‡ Garretson testified: (p. 769.)

"Q. You told Mr. Smith of the million dollar loan of course?

"A. Yes, sir.

"Q. He knew all about it?

"A. Yes, sir."

It affirmatively appears that E. R. Smith, secretary of Union Loan & Trust Co. knew of this loan. See his letter of Oct. 8th, 1891, p. 61 of this brief.

§ See pp. 98-99 of this brief and foot notes on those pages.

the pledge is terminated. *Casey vs. Caveroc*, 96 U. S., 467.

A redelivery to the pledgor, except it be for a temporary purpose, divests the possession of the pledgee and destroys the pledge. *Casey vs. Caveroc*, 96 U. S., 467.

So essential is the pledgee's possession of the securities to the validity of the pledge, that if the pledgee permit the pledgor to withdraw the securities, thereby clothing him with apparent ownership, the pledge will be defeated. *Fidelity Insurance, Trust and Safe Deposit Company vs. Roanoke Iorn Co.*, 81 Fed. Rep., 445.*

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* In *Fidelity Insurance, Trust & Safe Deposit Co. vs. Roanoke Iron Co.*, 81 Fed. Rep. 445, Simonton, Circuit Judge, said:

"The first question is, was this arrangement between the iron company and the warehouse company a valid pledge? Two things are essential to constitute a pledge; first, possession by the pledgee, second, that the property pledged be under the power and control of the creditor. 'The difference,' says Bradley, J., in *Casey vs. Caveroc*, 96 U. S., 477, 'between a mortgage and a pledge is that title is transferred by the former, and possession by the latter. Indeed, possession may be considered as of the very essence of a pledge; and, if possession be once given up, the pledge, as such, is extinguished.' See, also, *Christian vs. Railroad Co.*, 133 U. S., 243, 10 Sup. Ct., 260. In *Easton vs. Bank*, 127 U. S., 532, 8 Sup. Ct., 1297, it is thus stated: 'When personal property is pledged, the pledgee acquires the legal title and the possession. In some cases, it is true, it may remain in the apparent possession of the pledgor, but, if so, it can only be when the pledgor holds as agent for the pledgee.' One step further: The pledgee may deliver the personalty pledged again to the pledgor. If he do this for a temporary purpose only, the goods to be redelivered, or they be put into the hands of the pledgor for sale as agent for

IV.

The Union Loan and Trust Company, Having put E. R. Smith, as Secretary and Treasurer, in Possession of the Securities, and with Apparent Authority to Release or Dispose of the same, Cannot Reclaim the Securities on the Pretense that He was not Authorized to Surrender or Deliver the same to Mr. Garretson or to His order.

The facts are that such of the securities in controversy in this suit as at any time came into the possession of the Union Loan & Trust Company, were either deposited there by Mr. Garretson or by his order and direction, and with an understanding on his part that he was authorized to withdraw the said securities for purposes of sale, pledge or otherwise, ‖ and he continued to act on that theory during the whole course of his dealings, with the knowledge, consent and approval of E. R. Smith, as secretary and treasurer of the Union Loan & Trust Company. *

The case is not one of an unlawful or unauthorized withdrawal of the securities by Mr. Garretson, but the case made in the record is that the Union Loan & Trust Company, by E. R. Smith, its secretary and treasurer, directly transmitted the securities of the

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the pledgee, or if the pledge be of choses in action for the collection by the pledgor for the use of the pledgee, this will not defeat the pledge. But the delivery back by the pledgee or with his consent, without more, terminates the pledge. *Casey vs. Caveroc*, 96 U. S., 478."

‖ See Garreston's testimony, foot notes on pages 48 and 49 of this brief.

* See pp. 48–9 of this brief.

Sioux City & Northern R. R. Co. to New York, † and E. R. Smith, as Secretary and Treasurer, likewise transmitted $1,433,000 of Nebraska & Western bonds to Mr. Garretson at Omaha to be delivered to George W. Wickersham, as the agent and attorney of J. Kennedy Tod & Co. under the contract for the $1,000,000 loan, and to be then and there turned into court as a part of the reorganization scheme by which the Sioux City, O'Neill & Western bonds were to be issued. ‡

The Union Loan & Trust Company for all practical purposes was under the control, of E. R. Smith, its secretary and treasurer. He was the only person actively engaged in the management of its affairs from the time of its organization until the time of its failure, in 1893. § He was thus clothed with apparent authority, and was held out to the public as having unlimited authority to manage its business and to part with or dispose of any of its securities. This manner of conducting the business of the Union Loan & Trust Company entirely justified Judge Shiras in stating in his opinion (rec. p. 392); * "Taking the entire evidence into consideration, it is fairly deducible therefrom that the trust company parted with the possession of the securities knowing that it was intended to rehypothecate them. It is entirely clear that E. R. Smith, the secretary and treasurer of the trust company, dealt with

† See part VI of this brief, beginning p. 55, and the letters of Mr. Smith, as secretary and treasurer, making transmittals of the securities to the Manhattan Trust Company and J. Kennedy Tod & Co., pp. 56 to 63 of this brief.

‡ See pp. 87 to 91 this brief and foot notes thereon.

§ See part I of this brief, beginning p. 22.

* This opinion is reported in 65 Fed. Rep., 559.

these securities as though he had full authority from the company so to do, and he obeyed Garreston's instructions in regard to the same without demur, and it does not appear that the trust company or any officer thereof ever objected to such disposition of the securities, and furthermore, so far as the evidence in this case discloses, the general management of the business of the trust company was entrusted to Smith with but little, if any, supervision on the part of the directors or other officers of the corporation."

The Union Loan & Trust Company is quite like a banking company, and the authority of Mr. Smith as its secretary and treasurer might fairly be inferred from the general manner in which the business of the company was transacted, and his right to dispose of the securities implied from the conduct or acquiescence of the corporation. When, during a long course of business, Mr. Smith as secretary and treasurer of the Union Loan & Trust Company, parted with the possession of the securities at pleasure, without complaint or objection on the part of the directors or other officers of the company, the Union Loan & Trust Company can not be heard to say that Mr. Smith, as such secretary and treasurer, acted without authority, when such claim would interfere with the rights of third persons, who had acquired rights to the securities. *Martin vs. Webb*, 110 U. S., 7.

‖ Mr. Justice Harlan said : (p. 14–15.)

"As the executive officer of the bank, he transacts its business under the orders and supervision of the board of directors. He is their arm in the management of its financial operations. While these propositions are recognized in the adjudged cases as sound, it is clear that a banking corporation may be represented by its cashier—at least where its charter does

The circumstances of the unlimited control which the Union Loan & Trust Company permitted E. R. Smith, as its secretary and treasurer, to exercise over its affairs, and as custodian of the securities, were such that if E. R. Smith had directly borrowed the money from J. Kennedy Tod & Co. and pledged the securities to J. Kennedy Tod & Co. as collateral, J. Kennedy Tod & Co. would have acquired a title thereto superior to

not otherwise provide—in transactions outside of his ordinary duties, without his authority to do so being in writing, or appearing upon the record of the proceedings of the directors. His authority may be by parol and collected from circumstances. It may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of the corporation, as represented by the board of directors. When, during a series of years or in numerous business transactions, he has been permitted, without objection and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations. Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank, and to make declarations of dividends. That which they ought by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

the claims of the Union Loan & Trust Company. *Railway Company vs. Lynde, et al.*, 55 Ohio St., 23, is quite in point. The Columbus & Indianapolis Central Railway Co. in 1870 placed 179 of its bonds in the possession of Benj. E. Smith, its president, and which bonds remained in his custody until 1875, when he borrowed $48,000 of W. H. Newbold, Son & Co., evidenced by his promissory note and secured by a pledge of certain of said bonds. Renewals of the loan were made until the year 1878, when W. H. Newbold, Son & Co. sold and became the purchasers of the bonds, paid off the loan and turned over to Smith the surplus, but no part was used for the benefit of the railway company. W. H. Newbold, Son & Co. then sent the bonds to New York for sale, and the same were purchased by the plaintiffs without notice of the unauthorized or unlawful acts of Smith. No authority or consent of the directors of the railway company was ever given to the issue or sale of the 179 bonds; hence it was insisted that the railway company, the owner of the bonds, could not be deprived of its title thereto without its consent. The court ruled that the railway company, having placed these bonds in the custody of Smith, the president, held him out as a person having authority to dispose of them, and could not shift the loss resulting to it from the transaction upon the purchasers of the bonds. ¶

¶ The Court said: (p. 44.) "No authority or consent was ever given by the board of directors of the said Columbus, Chicago & Indiana Central Railway Company to the issue or the sale of the said one hundred and seventy-nine bonds or any of them."

Again, p. 45: "It is true these bonds were negotiated to Newbold and son without the knowledge or consent of the

V.

Under no Circumstances can the Union Loan & Trust Company Claim to Hold the Sioux City, O'Neill & Western Bonds, Being the Only Bonds now in Controversy, as Collateral to Loans.

These bonds, after certification, were directly delivered by the Manhattan Trust Company, the trustee,

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company that made them, or the knowledge or consent of any of the companies into which it became merged by the several consolidations mentioned. But such consent and knowledge is not indispensable to pass the title to negotiable instruments. Where this class of paper, complete in form and transmissable by delivery, is placed by the maker or owner in the custody of one, who is thereby clothed with an apparent power of disposition, and the custodian avails himself of the opportunity thus afforded him to negotiate it to an innocent party, the title of the holder is not to be tested by principles applicable to stolen securities, but by principles properly applicable to the transaction as it actually occurred. That the title to negotiable securities may pass by virtue of such transaction as the finding of fact shows occured in respect to the negotiation of the bonds in question, is, we think, clear upon principle, and sustained by authority. *Railway Co. vs. Sprague*, 103 U. S. 756; *Fearing vs. Clark*, 16 Gray, 74."

Again, pp. 46–7: "On the other hand the maker of the bonds, a railway company, capable of acting through agents only, placed these bonds in the custody of its president, an agent clothed with high, though possibly not clearly defined powers. The bonds were perfect obligations, bearing on their face a certificate of authentication by the trustee and containing an express declaration of their transmissability from hand to hand by mere delivery. He was, up to and long after the time these bonds were negotiated, continued as president of the different consolidated com-

under the mortgage, to J. Kennedy Tod & Co. to secure the $1,000,000 loan, under the terms of the agreement of October 1st, 1891. * It cannot be said that the Union Loan & Trust Company ever had possession of these bonds. It is likewise true that at least $1,150,000 of the Nebraska & Western bonds were never in the custody of the Union Loan & Trust Company; hence the Union Loan & Trust Company could claim no right to the bonds. † The element of a pledge was lacking, to-wit, the delivery of the possession of these securities at any time or for any purpose to the Union Loan & Trust Company. (See authorities before cited.) Strictly speaking, this is not a case in which Hubbard as assignee of the Union Loan & Trust Company seeks to recover bonds which had been in its possession and wrongfully taken therefrom by Garretson and rehypothecated, but it is an action to recover the Sioux

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panies, as they were successively formed. The companies thus held him out to the world as one who could be trusted to transact matters of importance concerning their affairs. Under these circumstances what can be found tending to excite a doubt in the most cautious mind respecting his power to dispose of bonds so entrusted to him?

"If the maker of these bonds, and those who must abide by their title, can shift the responsibility and consequent loss resulting from this transaction from themselves to the holder of the bonds, it must be by the application of some stern rule of law founded upon considerations of public policy."

* See pp. 98-99 this brief and foot notes thereon.

† See pp. 86-87 this brief and foot notes thereon to the point that J. Kennedy Tod & Co. had possession of $1,000,000 of the bonds, and came into possession of $150,000 that had been pledged to St. Charles Car Co., and transmitted the same to Wickersham at Omaha to use in the purchase of N. & W. property.

City, O'Neill & Western bonds, which had not been delivered to the Union Loan & Trust Company and which had not been wrongfully taken from the custody of the Union Loan & Trust Company by Garretson and rehypothecated. It is an action to recover bonds which had never been in the possession of the Union Loan & Trust Company, but which had been directly delivered after certification to J. Kennedy Tod & Co., under the terms of a preexisting contract. Their right to have and receive the bonds was a right created before these bonds were in existence. A pledge of these bonds to the Union Loan & Trust Company did not exist and was impossible under the circumstances of the case.

Even though there had been a promise on the part of the syndicate to deliver the Sioux City, O'Neill & Western bonds to the Union Loan & Trust Company, such promise would not create any rights in that company. *Staples vs. Simpson's Administrators*, 60 Mo., App., 73. *

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* The court said (p 75):

"The primary fact necessary to constitute a valid pledge is that the subject thereof, if capable of personal possession, should be actually delivered to the pledgee. The possession thus transferred is the very essence of the right of the pledgee, and the only basis of his right to recover the property. These principles are too clear for a citation of authority. In the case at bar the jury were warranted in finding that "the interest notes were never delivered by Simpson to the plaintiff's agent," *and if it be conceded for the argument's sake that he promised to deliver them or offered to deliver them, yet it is obvious that such promise or proffer was wholly ineffectual to create a pledge, unless followed by a subsequent delivery.* Whether such an executory contract would be enforced in equity as between the immediate parties, it is not necessary to inquire; clearly it could not become a ground of a legal action to recover the property in specie."

VI.

The Securities in Controversy came into the Possession of J. Kennedy Tod & Co. Without any Actual Knowledge or Notice of any Claim Thereto by The Union Loan & Trust Company and were not Bound to Inquire Whether Such Claim Existed.

It is not claimed in the record that J. Kennedy Tod & Co. had any actual knowledge of the supposed agreement of pledge between the railroad syndicate and the Union Loan & Trust Company. Under the state of the record, the only serious contention on the part of the intervenor is that J. Kennedy Tod & Co. had notice of the dealings between the Wyoming-Pacific Improvement Company and the Manhattan Trust Company and of dealings between Garretson and the Manhattan Trust Company, but this is positively denied by J. Kennedy Tod & Co. ‡ But were this otherwise, it still would not follow that J. Kennedy Tod & Co. had knowledge of the lien of the Union Loan & Trust Company.

The contention of the intervenor goes to the point, however, that J. Kennedy Tod & Co., by the transactions between the Wyoming-Pacific Improvement Company and the Manhattan Trust Company, and between Garretson and the Manhattan Trust Company, was put upon inquiry, and that upon reasonable inquiry J. Kennedy Tod & Co. might have learned of the pretended claim of the Union Loan & Trust Company. Assume this contention to be true; nevertheless it is not sufficient to defeat the *bona fides* of J. Kennedy Tod & Co. *Murray vs. Lardner*, 2 Wall., 110; * *Hotch-*

‡ See XIV this brief, commencing p. 137.

* In *Murray vs. Lardner*, Mr. Justice Swayne said (p. 121): "The party who takes it before due for a valuable con-

kiss vs. National Banks, 21 Wall., 354; † *Swift vs. Smith*, 102 U. S., 442; ‡ *King vs. Doane*, 139 U. S., 166; § *Clark vs. Evans*, 27 U. S., App., 640; ‖ *Hop-*

sideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world.

"Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part.

"The burden of proof lies on the person who assails the right claimed by the party in possession."

†In *Hotchkiss vs. National Banks*, Mr. Justice Field said (p. 359):

"The law is well settled that a party who takes negotiable paper before due for a valuable consideration, without knowledge of any defect of title, in good faith, can hold it against all the world. A suspicion that there is a defect of title in the holder, or a knowledge of circumstances that might excite such suspicion in the mind of a cautious person, or even gross negligence at the time, will not defeat the title of the purchaser."

‡ In *Swift vs. Smith*, Mr. Justice Strong said: (p. 444.)

"One who purchases such paper from another, who is apparently the owner, giving a consideration for it, obtains a good title, though he may know facts and circumstances that cause him to suspect, or would cause one of ordinary prudence to suspect, that the person from whom he obtained it had no interest in it, or authority to use it for his own benefit, and though by ordinary diligence he could have ascertained those facts."

§ In *King vs. Doane*, Mr. Justice Harlan said: (p. 173.)

"In the case supposed (where the note was obtained by fraud) he must show that he paid value. That fact being established, he will be entitled to recover, unless it is proved that he purchased with actual notice of defect in the title, or in bad faith, implying guilty knowledge or willful ignorance."

‖ In *Clark vs. Evans*, an instruction was given to the jury

kins and Hammond vs. Withrow, 42 Ill. App., 584; *Wilson vs. Denton*, 82 Tex., 531; *First National Bank of Cameron vs. Stanley*, 46 Mo. App., 440; *Richardson vs. Monroe*, 85 Ia., 359; *Railway Co. vs. Sprague*, 103 U. S. 756–763.

Even though J. Kennedy Tod & Co. had made inquiry and become actually possessed of full knowledge of the dealings between the Wyoming-Pacific Improvement Company and the Manhattan Trust Company, and the dealings between Garretson and the Manhattan Trust Company, such knowledge according to the testimony of Theophilus King, would not have defeated the good faith of J. Kennedy Tod & Co. Theophilus King was a member of the creditors' committee and a witness for the intervenor, and taking into account all that he had heard of these dealings, he put the matter of good faith of J. Kennedy Tod & Co. in this mild form (rec. p. 596): "Well, I believe they had certain connections with the Manhattan Trust Company in making the

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which contained the following clause: "Or had knowledge of such facts as would put a prudent man on inquiry, and that inquiry if prosecuted would have led to a knowledge of the fraud, then you will find for the defendant."

Caldwell, Circuit Judge, said (p. 641):

"The charge was erroneous. 'Knowledge of such facts as would put a prudent man on inquiry' would not affect the right of the plaintiff to recover if she was otherwise a bona fide holder for value. One who purchases a negotiable note for value before maturity does not owe the maker the duty of making active inquiry into the origin or consideration of the note before purchasing the same. His right to recover can only be defeated by showing that he had actual notice of the facts which impeach the validity of the paper. 'Knowledge of such facts as would put a prudent man on inquiry' will not suffice."

loans to A. S. Garretson, which should have, from all that I heard, made them very careful in their transactions with him."

Admitting all that Mr. King had heard to have been true, it would not defeat the title of J. Kennedy Tod & Co. to these securities in the light of the foregoing authorities.

Of course, Mr. King does not say that J. Kennedy Tod & Co. knew of all the facts that he (King) had heard.

VII.

J. Kennedy Tod & Co. in Good Faith Came into Possession of the Securities for a Valuable Consideration Before Maturity, and that Title is not Impaired by the Fact that they were Pledged to Secure the Notes of the Pacific Short Line Bridge Company.

In the first instance, the securities were pledged with J. Kennedy Tod & Co. to secure a loan of $1,000,000. * When this loan became payable, the $1,500,000 loan was made upon the notes of the Bridge Company. † It is this last transaction which the intervenor vigorously assails.

Judge Shiras in his opinion, after reciting the facts which led up to the issue of the notes of the Bridge Company, said (rec. p. 394): "The evidence clearly shows that the notes in question were not purchased in the ordinary way of business, nor were they in fact issued by the Bridge Company in connection with the

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* See part IX of this brief, p. 84.

† See part X of this brief, p. 100.

business of that company." He further said (rec. p. 395): "In the face of the facts developed in the evidence, it cannot be held that the Union Debenture Company, J. Kennedy Tod & Co., the railroad syndicate or parties holding under them, have any enforcible rights against the Bridge Company growing out of the transactions in question, or based upon the notes or contract alleged to have been executed in the name of that company, nor can a good title to or interest in the railroad bonds and stocks in question be founded upon the title of the Bridge Company thereto."

These conclusions we do not believe are justified by the record. Let us briefly state the case:

These securities were already pledged to secure a loan of $1,000,000. That loan must be paid or the securities would be sold. The railroad syndicate claimed to be the owner of the securities and wished to preserve their equity in them. The railroad syndicate also controlled and owned the stock of the Bridge Company. The railroad syndicate entered into a contract with the Bridge Company to sell the securities to the Bridge Company and to take its notes for $1,500,000 and to receive back the securities as collateral to such notes. § The directors of the Bridge Company, by a series of resolutions, authorized and agreed to this transaction.

The railroad syndicate and the Bridge Company knew that these notes were to be resold and that the securities were to be rehypothecated to J. Kennedy Tod & Co. as trustees under the indenture of trust of December 31st, 1892.

This cannot be said to be a fraud upon the Bridge

§ See p. 105 this brief, and rec. pp. 1733–5.

‖ See p. 103 this brief, and rec. pp. 1498-9.

Company, because the Stockholders of the Bridge Company were the persons who composed the board of directors which authorized the transaction. As a matter of fact, the case stands as if the stockholders of the Bridge Company had directly authorized the board of directors to do what was done. It was therefore no fraud upon them, as they were the active agents in the transaction.

The fact that this form of negotiation may have been suggested by J. Kennedy Tod & Co. does not alter the case. The legal solution of the matter must depend upon what the Bridge Company did, no matter at whose suggestion it was done.

Even though this transaction was illegal as between the Bridge Company and J. Kennedy Tod & Co. or as between the Bridge Company and the Union Debenture Company, nevertheless such illegality could not confer any rights upon the Union Loan & Trust Company to assail the transaction. The only persons who could assail the legality of that transaction would be the Bridge Company in its own corporate right, or the shareholders of that company, or its creditors. The Bridge Company as a corporation cannot assail it, because it was the act of the corporation. The shareholders of the Bridge Company cannot assail it, because they were the active agents in the transaction. There is no proof in the record of any creditors of the Bridge Company who are complaining. In short, none of the persons or parties who are in a situation to assail the transaction are making an assault upon it.

Again, before this transaction J. Kennedy Tod & Co. were in possession of the securities under the contract of October 1st, 1891, and were entitled to hold

the same against the claims of the Union Loan & Trust Company. This title of J. Kennedy Tod & Co. to the securities was not taken from them and reinvested in the Union Loan & Trust Company by this transaction through the Bridge Company. There was nothing in this transaction which created in the Union Loan & Trust Company any greater right to the securities than it had before. If the Union Loan & Trust Company had already become divested of its title, it cannot be said that it acquired a new title to the securities by the transaction complained of. The result is that the Union Loan & Trust Company is in no better situation to assert title since the loan for $1,500,000 than it was to assert title against the loan for $1,000,000. The question that we have to deal with here is the claim of the Union Loan & Trust Company to these securities, and not the claim of the Bridge Company or of its stockholders or judgment creditors.

Suppose J. Kennedy Tod & Co. did know of infirmities in the Bridge Company notes arising from the nature of the transaction, the fact remains that these notes passed into the hands of strangers for value before maturity, by sales made by J. Kennedy Tod & Co. as brokers for the Union Debenture Company, ¶ and these holders of the notes are not chargeable with or burdened by such notice or knowledge of J. Kennedy Tod & Co. These note holders purchased the notes in the regular way, on the faith of the securities so pledged, and placed in the hands of J. Kennedy Tod & Co. under the indenture of trust of December 31st, 1892. It is the rights of these note holders that are to be protected. Notice to

¶ See p. 113 this brief.

the trustee is not notice to them. *Commissioners vs. Thayer*, 94 U. S., 631–644. *National Water Works Co. vs. Kansas City*, 78 Fed. Rep., 434. *

The rights of the note holders to their interest in these securities cannot be adjudicated in this case, as they are not before the court. † One hundred and eighteen of these notes are held abroad ($590,000) and $500,000 are held by James J. Hill or the Great Northern, and it does not appear who are the owners and holders of the remaining notes, but it does appear affirmatively that J. Kennedy Tod & Co. did not purchase any of the notes. ‡

It may be said that the use of the name of the Bridge Company in making the loan of $1,500,000 was a matter of form rather than of substance. It was the original purpose to give the notes of the Sioux City, O'Neill & Western Railway Company, but this form of procedure was abandoned and the use of the name of the Bridge Company was resorted to at the suggestion of counsel. All of the parties to the transaction under-

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* Brewer, Circuit Justice, said in *National Water Works Company vs. Kansas City*, *supra*, (p. 434): "Especially is this true when the beneficiaries are purchasers from the trustee of negotiable bonds issued by the grantor of the trust, for in such case the beneficiaries have a right to invoke the protection which attaches to negotiable paper."

† On this point Judge Shiras said: (p. 397). "That in seeking redemption of these securities neither the syndicate nor the Trust Company can be permitted to question the validity of the varied monied transactions preceeding the loan of the $1,500,000, and which lead up thereto, as the parties in interest therein are not all parties to this suit, and cannot be made such."

‡ See J. Kennedy Tod's testimony, rec. p. 619 and p. 113 this brief and foot note.

stood that the end to be consummated was a loan of $1,500,000 for the purpose of taking up the $1,000,000 loan outstanding and to procure some surplus money, which according to the testimony of Mr. Garretson, was turned over to the Union Loan & Trust Company with directions that it be applied partly on the obligations of the Bridge Company and partly in payment of the syndicate notes outstanding. Equity looks at the substance rather than the form of the proceeding. §

§ On this point Judge Shiras said: (rec. p. 396).

"The use of its (the Bridge Company's) name in these transactions was in reality a matter of form, and was so understood by all the parties in interest, and a court of equity in now dealing with the rights of the parties is justified in disregarding the form given to the transaction and should be governed by the real substance thereof. * * In short, the facts are that the railroad syndicate in December, 1892, negotiated a loan through J. Kennedy Tod & Co. and with the assent of the Union Loan & Trust Company pledged as security therefor the stock and bonds in question. Under these circumstances, before the Union Loan & Trust Company can reclaim the securities for its protection as endorser of the syndicate paper, it must pay off the loan made on the faith of the pledge thereof. The fact that the use of the name of the Bridge Company may have been unauthorized does not defeat the equitable lien created by the actual pledge of the stock and bonds. Brushing aside all connection of the Bridge Company with the transaction, the fact remains that the syndicate procured a loan of $1,500,00 by pledging the stock and bonds as security therefor, and the equity in the securities thus created is superior to that existing in favor of the Trust Company because it is accompanied with the possession of the bonds."

VIII.

If Hubbard as Assignee of the Union Loan & Trust Company had a Right to Redeem the Securities on the 25th Day of September, 1893, such Right was Dependent upon an Unconditional Payment or Tender of Full Payment of the Debt.

On the 25th day of September, 1893, Coombs, Plummer and King made a proposition to J. Kennedy Tod & Co. to pay the defaulted interest, but only on condition that J. Kennedy Tod & Co. should arrange to give them the control of the directory of the Sioux City & Northern R. R. Co., a condition which J. Kennedy Tod & Co. had no power to grant, if they had been so disposed. There was not even an unconditional offer to pay the interest, and no offer to pay or tender of the full amount of the debt. In fact, they were unable to make a tender of the payment of the debt, and desired to make it one of the conditions of payment of the defaulted interest that the whole debt should be extended. *

At that date, the principal of the debt had been declared to be due upon request of the note holders, and an auction sale of the securities was to take place on the following day, the 26th of September, pursuant to a demand of the note holders † J. Kennedy Tod & Co. had no right under the conditions then existing to accept anything less than a payment in full of the debt. To have accepted the defaulted interest from these people at that time would have been a recognition of a title antagonistic to the rights of the note holders.

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* See part XII of this brief, beginning p. 122.

† See p. 119 of this brief, and foot notes.

This would have been a breach of duty on the part of J. Kennedy Tod & Co. as trustees. Again, unless there had been a completed pledge (to-wit, a previous delivery) of these securities to the Union Loan & Trust Company, no right of redemption existed in it.

The present bill of the intervenor is not a bill to redeem, but is a bill to reclaim the securities, disavowing any rights of J. Kennedy Tod & Co. or of the note holders to the securities. The intervenor is not entitled to the relief prayed. *Thompson et al. vs. St. Nicholas National Bank*, 113 N. Y., 325. ‡ Wood's Appeal, 92 Pa. St., 379. *Glidden vs. Mechanics' National Bank*, 53 Ohio St., 588.

IX.

The Sale of the Securities at Public Auction by an Auctioneer and the Purchase of the Same by J. Kennedy Tod & Co. as Purchasing Trustees Passed the Legal Title and cut off the Right of Redemption.

The sale was made on demand of the note holders after due publication and after service of notice upon

‡ In *Thompson et al. vs. St. Nicholas National Bank, supra*, the court said: (p. 336).

"The plaintiff's intestate could, undoubtedly, at any time have established his equitable right to a return of the bonds and procured their surrender by paying the amount for which they were pledged, but this he not only refrained from doing, but impliedly denied any right in the defendant by demanding the unconditional surrender of the bonds. This he never became entitled to, and, of course, is not authorized to recover their possession in this action."

all the parties entitled to such notice. * The sale was conducted by Richard V. Harnett & Co., auctioneers. No charge is made that there was any unfairness in conducting the sale, nor that the price paid was not the fair value of the securities.

J. Kennedy Tod & Co. had a right to purchase the securities at the auction sale as purchasing trustees. In paragraph 8 of the indenture of trust of December 31st, 1892, it is provided that the trustee may purchase, † or the holders of two-thirds in amount of the notes may appoint a purchasing trustee. ‡

The note holders were satisfied with this sale, for they turned in to J. Kennedy Tod & Co. their notes and received certificates from J. Kennedy Tod & Co. as purchasing trustees, showing their respective interests in the securities so sold. §

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* See part XI of this brief, beginning p. 117.

† It is provided in paragraph 8 of the indenture of trust: (rec. p. 640). "It being expressly understood and agreed that the trustees or either of them or any one on their behalf may bid for and purchase in their individual interest, free and discharged from the trust hereof, any property sold at such sale."

‡ Rec. p. 640: "The holders of two-thirds in amount of the notes at the time outstanding secured hereby may in their discretion appoint a purchasing trustee to purchase the securities sold at any such sale, for the use and benefit of the holders of all the outstanding notes then secured hereby, and any purchasing trustee so appointed shall be fully authorized to make such purchase for and on behalf of all the holders of outstanding notes issued hereunder and secured hereby, and having purchased said securities, the right and title thereof shall vest in the purchasing trustee so appointed, in trust for the benefit of all of said note holders, in proportion to the amounts remaining due on account of their respective notes."

§ See p. 121 of this brief, and foot-note.

The parties had a right to agree that the pledgee could be a purchaser at the sale. *Chouteau vs. Allen*, 70 Mo. 290.

No other bidders were present at the sale, and J. Kennedy Tod & Co. were not required to let the securities be sacrificed. *Fidelity Insurance, Trust & Safe Deposit Co. vs. Roanoke Iron Co.*, 81 Fed. Rep., 439. ¶

This case is distinguishable from cases where there is no provision in the indenture of trust permitting the trustee or pledgee to become the purchaser. In any event, such sales are not void, but voidable only at the instance of the *cestui que trust*, and will be sustained if fairly made. *Twin Lock Oil Co. vs. Marbury*, 91 U. S., 587.

Where there is no provision in the contract of pledge authorizing the trustee to purchase, the sale is voidable only at the election of the pledgor. *Bryan vs. Baldwin*, 52 N. Y., 232. * *Chouteau vs. Allen*, 70 Mo., 290-335. ** When such sales are fairly made, they will

¶ In *Fidelity Insurance, Trust & Safe Deposit Co. vs. Roanake Iron Co., supra*, the court said: (p. 450.) "It would be imposing a great hardship and injustice upon the pledgee under the circumstances in this case, to say that while acting under the authority given him by the pledgor, and in good faith, he shall be required to stand by, and see the only security he has for the payment of his debt perhaps sacrificed, and he not permitted to protect his interests in the only way he can, by becoming a purchaser himself."

* In *Bryan vs. Baldwin, supra*, the court said: (p. 235.) "But he did not in fact sell it. He placed it in the hands of an auctioneer for that purpose, who put it up for sale, and no one bidding except the plaintiff, the auctioneer struck it off to him. The plaintiff being the pledgee of the stock, and in that character exposing it for sale, could not become the purchaser

be sustained, and they are only voidable at the instance of the *cestui que trust*. *Hook vs. Ayers*, 24 U. S. App., 202. †

Third persons have no right to question the regularity of the sale. *Farmers' Loan & Trust Co. vs. Young*, 6 U. S., App., 469. ‡

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unless the defendant assented to such purchase. * * This sale to the plaintiff was not void, but voidable at the election of the defendant."

** In *Chouteau vs. Allen*, *supra*, the court said: (p. 335).

"There is no doubt that such a sale is not absolutely void, but only voidable, for it may be sanctioned or ratified by consent and this is shown by numerous authorities."

† In *Hook vs. Ayers*, *supra*, *Jenkins*, Circuit Justice, said: (p. 216.) "But it is a mistake to suppose that such transactions are absolutely void. They are at most voidable at the instance of the *cestui que trust*. Such dealings are upheld when they are fair and in good faith, and without impeachment of the fiduciary relation."

‡ *Farmers' Loan & Trust Company vs. Young*, 6 U. S., App., 469, is a case where a pledgee of bonds made a sale and himself became the purchaser. Jackson, Circuit Judge, said: (p. 493). "The sale and purchase of these bonds by the bank under and within the terms of the railroad company's note and pledge of the collateral, was not *per se* void. It was at most only voidable, at the instance, and upon reasonable objection, on the part of the corporation or its stockholders. Third parties or strangers have no right to question or challenge the bank's title to the bonds on the ground either of inadequacy of the price paid for the same, or for the reason that it occupied such a *quasi-trust* relation to the pledgor as to disqualify it from purchasing at a sale made for its own benefit. The securities having been regularly issued and hypothecated, as collateral for a debt, the company was authorized to contract, and thereafter lawfully sold under the terms of the pledge, upon proper notice, even the maker of the paper could not impeach the purchaser's title

If the sale of the securities and purchase thereof by J. Kennedy Tod & Co. is ruled to be void, the parties are remitted to their rights as if no sale had been made, and does not deprive J. Kennedy Tod & Co. of the right to the securities. *Bryan vs. Baldwin*, 52 N. Y., 232. *

Glidden vs. Mechanics' National Bank, 53 O. St., 588. †

Stokes et al. vs. Frazier, 72 Ill., 428 ‡ *Duncomb vs.*

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thereto, and the right to recover the amount thereof, without setting up and establishing fraud or breach of trust causing injury. Such an objection by way of impeachment of the purchaser's title to the pledged security is manifestly personal, or, in cases like the present, is confined to the corporation or its stockholders."

This was a case (in its form of procedure quite like the case at bar) where Young, in a suit to foreclose the mortgage intervened, claiming an equitable lien prior to the mortgage for the value of his stock, and the court ruled that he had no right to attack the sale of the securities.

* In *Bryan vs. Baldwin*, *supra*, the court said: (p. 235).

"But the defendant has not done this, but has elected to treat the purchase by the plaintiff as illegal. This avoids the sale, and that being avoided by the defendant, the parties are remitted to their rights the same as though no sale had been attempted; the defendant is liable upon the note, and the plaintiff still holds the stock as pledgee."

† In *Glidden vs. Mechanics' Nat. Bank*, *supra*, the court said: (p. 600). "The relation of the parties remains the same as before the sale, the pledgee continuing to hold under the contract of pledge, leaving the title to the property and the rights of the parties unaffected, as though no sale had been attempted."

‡ In *Stokes vs. Frazier*, *supra*, the court said: (p. 432).

"Having elected to avoid the sale, they thereby place all parties *in statu quo*, neither the one nor the other party having lost or gained anything by the sale."

N. Y. H. & N. R. R. Co., 84 N. Y., 190, 204-5. *Md. Fire Ins. Co. vs. Dalrymple*, 25 Md., 242, 267.

Even though the sale of September 26th, 1893, be treated as invalid, the right to redeem does not exist until in the first instance there has been a payment or tender of payment of the debt. *Glidden vs. The Mechanics' National Bank*, 53 Ohio St., 588. If the sale is to be treated as no sale, this must necessarily be so.

In this case the intervenor is before this court, not with a tender of payment but in a hostile attitude, resisting a compliance with the equitable rule and hence not entitled to any relief whatever.

There seems to the writer of this brief to be a defect of parties that is fatal to the relief sought by the intervenor. The holders of the notes for $1,500,000, for whose security the bonds and stock were deposited with J. Kennedy Tod & Co., are not before the Court. To permit the intervenor to reclaim the securities without payment of the debt would be taking from the noteholders their security without giving them their day in Court.

Again, the legal title to the securities was in the Bridge Company, or, that failing, the legal title was in A. S. Garretson or the Railroad Syndicate.

A. S. Garretson was pledgor to J. Kennedy Tod &

‖ In *Glidden vs. The Mechanics' Natianal Bank, supra*, the court said: (p. 600). "Under a contract of pledge, the right of the pledgee to retain possession of the property continues until the debt or engagement for the security of which it was pledged has been discharged by payment or performance, or a tender, and a demand for its return. * * (p. 601): "On the other hand, in the absence of any stipulation to the contrary, it is the duty of the debtor to seek the creditor at the proper place and pay the debt, or tender its payment, before he is entitled to receive back the pledge."

Co. To permit the intervenor to reclaim the securities, the Bridge Company and A. S. Garretson should have been made parties to the Bill of Intervention, as the relief sought is to require the surrender of the securities by J. Kennedy Tod & Co., to Hubbard, assignee of the Union Loan & Trust Company. If J. Kennedy Tod & Co. as pledgees should voluntarily deliver these securities to Hubbard as assignee, the pledgor could charge J. Kennedy Tod & Co. with conversion and bring an action against them for damages. *Griggs vs. Day*, 136 N. Y., 152–160.

All authorities are to the point that the pledgee is held accountable to the pledgor for the disposition which he may make of the securities.

Can this Court enter a decree requiring J. Kennedy Tod & Co. to make a disposition of the securities antagonistic to the rights of the pledgor without having the pledgor before the Court?

There is a question of usury presented by the intervenor, but which is fully answered by the brief of my associates.

Jno. L. Webster

of Counsel for J. Kennedy Tod & Co